SUPREME COURT OF THE STATE OF CONNECTICUT

S.C. 19832
S.C. 19833

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL

V.

BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A, ET AL

APPENDIX PARTS 1 AND 2 TO BRIEF OF DEFENDANTS-APPELLEES

TO BE ARGUED BY: JAMES VOGTS AND CHRISTOPHER RENZULLI

FOR DEFENDANTS-APPELLEES:

JAMES VOGTS
ANDREW A. LOTHSON
SWANSON, MARTIN & BELL, LLP
330 NORTH WABASH, STE. 3300
CHICAGO, IL 60611
TEL: (312) 321-9100
FAX: (312) 321-0990
JVOGTS@SMBTRIALS.COM
ALOTHSON@SMBTRIALS.COM

JONATHAN P. WHITCOMB
SCOTT M. HARRINGTON
DISERIO MARTIN O'CONNOR & CASTIGLIONI LLP
ONE ATLANTIC STREET
STAMFORD, CT 06901
TEL: (203) 358-0800
FAX: (203) 348-2321
JWHITCOMB@DMOC.COM
SHARRINGTON@DMOC.COM

ATTORNEYS FOR REMINGTON ARMS CO., LLC AND REMINGTON OUTDOOR COMPANY, INC.

CHRISTOPHER RENZULLI
SCOTT C. ALLAN
RENZULLI LAW FIRM LLP
81 MAIN STREET, STE. 508
WHITE PLAINS, NY 10601
TEL: (914) 285-0700
FAX: (914) 285-1213
CRENZULLI@RENZULLILAW.COM
SALLAN@RENZULLILAW.COM

ATTORNEYS FOR CAMFOUR, INC. AND CAMFOUR HOLDING, INC.

PETER M. BERRY
BERRY LAW LLC
107 OLD WINDSOR ROAD,
2ND FLOOR
BLOOMFIELD, CT 06002
TEL: (860) 242-0800
FAX:
FIRM@BERRYLAWLLC.COM

ATTORNEY FOR RIVERVIEW SALES, INC. AND DAVID LAGUERCIA

SUPREME COURT OF THE STATE OF CONNECTICUT

S.C. 19832
S.C. 19833

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL

V.

BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A, ET AL

APPENDIX PART 1 TO BRIEF OF DEFENDANTS-APPELLEES

TO BE ARGUED BY: JAMES VOGTS AND CHRISTOPHER RENZULLI

FOR DEFENDANTS-APPELLEES:

JAMES VOGTS
ANDREW A. LOTHSON
SWANSON, MARTIN & BELL, LLP
330 NORTH WABASH, STE. 3300
CHICAGO, IL 60611
TEL: (312) 321-9100
FAX: (312) 321-0990
JVOGTS@SMBTRIALS.COM
ALOTHSON@SMBTRIALS.COM

JONATHAN P. WHITCOMB
SCOTT M. HARRINGTON
DISERIO MARTIN O'CONNOR & CASTIGLIONI LLP
ONE ATLANTIC STREET
STAMFORD, CT 06901
TEL: (203) 358-0800
FAX: (203) 348-2321
JWHITCOMB@DMOC.COM
SHARRINGTON@DMOC.COM

ATTORNEYS FOR REMINGTON ARMS CO., LLC AND REMINGTON OUTDOOR COMPANY, INC.

CHRISTOPHER RENZULLI
SCOTT C. ALLAN
RENZULLI LAW FIRM LLP
81 MAIN STREET, STE. 508
WHITE PLAINS, NY 10601
TEL: (914) 285-0700
FAX: (914) 285-1213
CRENZULLI@RENZULLILAW.COM
SALLAN@RENZULLILAW.COM

ATTORNEYS FOR CAMFOUR, INC. AND CAMFOUR HOLDING, INC.

PETER M. BERRY
BERRY LAW LLC
107 OLD WINDSOR ROAD,
2ND FLOOR
BLOOMFIELD, CT 06002
TEL: (860) 242-0800
FAX:
FIRM@BERRYLAWLLC.COM

ATTORNEY FOR RIVERVIEW SALES, INC. AND DAVID LAGUERCIA

TABLE OF CONTENTS FOR DEFENDANTS-APPELLEES' APPENDIX

Part One

Part Two

DN FST CV 15 6048103-S

DONNA L. SOTO, ADMINISTRATRIX	)	SUPERIOR COURT
OF THE ESTATE OF VICTORIA L.	)	
SOTO, DECEASED, ET AL.	)	J.D. OF FAIRFIELD/BRIDGEPORT
	)	@ BRIDGEPORT
v.	)	
	)	
BUSHMASTER FIREARMS	)	
INTERNATIONAL, LLC, ET AL.	)	April 22, 2016

REMINGTON'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

INTRODUCTION

Remington is immune from Plaintiffs' claims under the Protection of Lawful Commerce in Arms Act. 15 U.S.C. § 7901 *et seq*. ("PLCAA"). Contrary to federal law, Plaintiffs seek to hold Remington responsible for the shooting at Sandy Hook Elementary School under various legal theories, including (1) negligent entrustment, (2) product liability, and (3) violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). (*See, e.g.*, Pls.' First Am. Compl. ("FAC") at Count One, ¶¶ 213-227.) The PLCAA bars all three claims of Plaintiffs' First Amended Complaint as alleged against Remington.

The PLCAA was enacted to protect, *inter alia*, firearm manufacturers from civil actions for damages and other relief resulting from the criminal or unlawful use of firearms by third parties. 15 U.S.C. § 7901(b)(1). By providing immunity for such actions, Congress focused specifically on litigation that had "been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by third parties, including criminals." 15 U.S.C. § 7901(a)(3). Congress found these lawsuits to be "an abuse of the legal system" and enacted the PLCAA to ensure that those who manufacture firearms are not held "liable for the harm caused by those who criminally or unlawfully misuse them." 15 U.S.C. §§ 7901(a)(5) & (6). This lawsuit falls squarely within the immunity that the PLCAA affords to firearm manufacturers. As a result, Plaintiffs have failed to state viable claims against Remington. 15 U.S.C. § 7902.

Additionally, the CUTPA claims fail because (1) Plaintiffs are not consumers of Remington's product and are not competitors or other business persons with a commercial relationship to Remington; (2) Plaintiffs have not alleged the type of financial injury that CUTPA was enacted to redress; (3) the CUTPA claims are barred by the 3-year statute of limitations; (4)

the CUTPA claims are barred by the "exclusivity" provision of the Connecticut Product Liability Act ("CPLA"); and (5) the CUTPA claims are barred by § 42-110c(a).

MOTION TO STRIKE STANDARD

A motion to strike challenges the legal sufficiency of a complaint or any count therein, *Gulack v. Gulack*, 30 Conn. App. 305, 309, 620 A.2d 181 (1993), and requires no factual findings by the court. *Vacco v. Microsoft Corp*., 260 Conn. 59, 64-65, 793 A.2d 1048, 1051 (2002); Practice Book § 10-39. "The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." *Coe v. Board of Education*, 301 Conn. 112, 116-17, 19 A.3d 640 (2011) (citation omitted; internal quotation marks omitted).

BACKGROUND

Plaintiffs' case against Remington is premised on their allegations that one of the firearms criminally misused by Adam Lanza – a Bushmaster XM-15 semi-automatic rifle – should not have been marketed and sold for civilian use in Connecticut because it allegedly posed an unreasonable risk of injury. The rifle had been lawfully purchased in 2010 by Adam Lanza's mother, Nancy. Like any adult resident of Connecticut who passed the required law enforcement background check and was not otherwise legally disqualified from owning or possessing the rifle, she could purchase, own and use the firearm for lawful purposes. *See* 18 U.S.C. § 922(t)(1); 27 C.F.R. § 478.102. There are no allegations that Remington's manufacture of the rifle violated any of the then existing federal, state or local firearm laws, regulations and ordinances. *See, e.g*., Conn. Gen. Stat. § 53-202a(a)(3) (1993) (defining prohibited "assault weapons" as those having at least two specified features, *e.g.*, telescoping stock, pistol grip, flash suppressor). Plaintiffs nevertheless seek to turn

the lawful actions of the rifle's manufacturer into actionable wrongs justifying injunctive relief and recovery of compensatory and punitive damages for wrongful death and personal injury.

A. The rifle was lawfully marketed, sold and possessed in Connecticut in 2010 and is lawful to possess in Connecticut today.

The XM-15 rifle and other AR-type semiautomatic rifles with similar design features have been purchased and owned for decades by "[m]illions of Americans" for lawful civilian purposes. *Shew v. Malloy*, 994 F.Supp.2d 234, 245 (D.Conn. 2014), *aff'd in part, rev'd in part*, 804 F.3d 242 (2d Cir. 2015) ("[T]here can be little dispute that tens of thousands of Americans own these guns and use them exclusively for lawful purposes such as hunting, target shooting and even self-defense."); *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2010) ("We think it clear enough . . . that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use' as the plaintiffs contend.").[1] Semiautomatic rifles like the XM-15 "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994).

In 2013, the Connecticut General Assembly passed "An Act Concerning Gun Violence Prevention and Children's Safety" in response to the shooting at Sandy Hook Elementary School. Conn. Gen. Stat. §53-202a (2013) (the "Act"). The Act expanded an earlier statutory definition of prohibited "assault weapons" to include specific semiautomatic rifles listed by make and model as well as and other rifles with certain prohibited design features. *Compare* Conn. Gen. Stat. § 53-202a (2013) (prohibiting rifles by specific make and model and others with two or more prohibited

[1] "AR" stands for Armalite, the company that first manufactured this type of semi-automatic rifle. Generally, an AR-type firearm is a semi-automatic rifle that has a detachable magazine, has a grip protruding roughly four inches below the action of the rifle, and is easily accessorized. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 364 (W.D.N.Y. 2013). A semi-automatic firearm fires only one shot with each pull of the trigger, in contrast to an automatic firearm, which fires repeatedly with a single trigger pull. *Heller v. District of Columbia*, 670 F.3d 1244, 1285-86 (D.C.Cir. 2011) (Kavanaugh J., dissenting). The vast majority of new handguns today are semi-automatic. *Id*.

design features); *with* Conn. Gen. Stat. § 53-202a (1993). The Act also prohibited the sale and purchase of ammunition magazines capable of holding more than ten rounds. Conn. Gen. Stat. § 53-202w ("large capacity magazines").

The XM-15 rifle was among the firearms newly defined by the General Assembly as an "assault weapon" in 2013. Conn. Gen Stat. § 53-202a(1)(B); *see also Shew*, 994 F.Supp.2d at 238-41. However, the General Assembly did not ban possession of the rifle and other firearms it classified as "assault weapons" or "large capacity magazines" altogether. Persons may lawfully possess the firearms today in Connecticut, provided they were lawfully owned as of April 4, 2013 and they are registered with the state. Conn. Gen. Stat. § 53-202d(a)(2)(A). And the firearms may be lawfully manufactured in Connecticut for sale outside the state. Conn. Gen. Stat. § 53-202i (circumstances in which manufacture of "assault weapons" not prohibited). "Large capacity magazines" may still be possessed in Connecticut if they were possessed prior to January 1, 2014 and a certificate of possession is obtained. Conn. Gen. Stat. § 53-202x.

Against this legislative back-drop, Plaintiffs contend the XM-15 rifle had negligible utility for hunting, sporting and self-defense use, posed unreasonable risks of physical injury and should not have been marketed and sold in 2010 for civilian use in Connecticut. (FAC at ¶¶ 12, 166.) Through this case, Plaintiffs, in essence, seek to substitute their view on what types of firearms law-abiding persons should be permitted to own in Connecticut for the policy choices made by the General Assembly.

B. Public policy regarding the manufacture, marketing, sale and ownership of firearms has been established by the legislative branches of government and should not be undone by courts or juries.

The General Assembly's actions in 2013 underscore that policy decisions regarding what types of firearms are lawfully manufactured, marketed and sold for civilian use are appropriately

made by legislatures, not by courts or juries on a case-by-case basis. *See New York State Rifle & Pistol Ass'n v. Cuomo*, 2015 U.S. App. LEXIS 18121, *40 (2d Cir. Oct. 19, 2015) ("We remain mindful that '[i]n the context of firearms regulation, the legislature is far better equipped than the judiciary to make sensitive policy judgments . . . concerning the dangers of carrying firearms and the manner to combat those risks.'") (internal citation omitted).[2]

The role legislatures have in regulating firearms is reflected in one of the stated purposes of the PLCAA: "[t]o preserve and protect the Separation of Powers doctrine" found in the United States Constitution. 15 U.S.C. § 7901(b)(6). The separation of powers doctrine is also firmly embedded in Connecticut law and the Connecticut Constitution. CONN. CONST., Article II; *see University of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 394, 512 A.2d 152 (1986) ("In the establishment of three distinct departments of government the Constitution, by necessary implication, prescribes those limitations and imposes those duties which are essential to the independence of each and to the performance by each of the powers of which it is made the depository."); *Kelley Property Dev., Inc. v. Lebanon*, 226 Conn. 314, 339-340, 627 A.2d 909 (1993) (separation of powers requires judicial deference to legislative resolution of conflicting considerations of public policy).

Congress deemed the PLCAA necessary because "liability actions" were seen as

---

[2] *See also City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1121 (Ill. 2004) ("[T]here are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms."); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. App. 2001) ("[T]he judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government, but to the legislative branch."); *People v. Sturm, Ruger*, 761 N.Y. 2d 192, 203 (N.Y. App. 2003) ("As for those societal problems associated with, or following, legal handgun manufacturing and marketing, their resolution is best left to the legislative and executive branches."); *In re Firearms Cases*, 126 Cal. App. 4th 959, 985 (Cal. App. 2005) ("While plaintiffs' attempt to add another layer of oversight to a highly regulated industry may represent a desirable goal . . . [e]stablishing public policy is primarily a legislative function and not a judicial function, especially in an area that is subject to heavy regulation."); *Hamilton v. Beretta*, 96 N.Y. 2d 222, 239-40 (N.Y. 2001) ("[W]e should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales remains the focus of a national policy debate.").

"attempt[s] to use the judicial branch to circumvent the legislative branch of government." 15 U.S.C. § 7901(a)(8). Plaintiffs seek to do exactly that in this case: circumvent the policy choice made by the General Assembly that the firearm purchased by Nancy Lanza in 2010 was lawful to manufacture, market, sell and possess in Connecticut. The criminal use to which the firearm was put was indeed tragic. However, as a matter of sound judicial policy, the decision made by the General Assembly cannot be undone by a court without significantly interfering with the powers that reside within the legislative branch of government.

ARGUMENT

A. Remington is immune from suit under the PLCAA.

1. Operation and application of the PLCAA.

The PLCAA was enacted to protect firearm manufacturers against the very claims Plaintiffs make in this case. The declared purpose of Congress was to "prohibit causes of action against manufacturers, distributors, dealers and importers of firearms" for harm "caused by the criminal or unlawful use of firearms" that "functioned as designed and intended." 15 U.S.C. § 7901(b)(1); *see City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) ("We think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the 'lawful design, manufacture, marketing, distribution, importation or sale of firearms.'"). Congress viewed actions by state and municipal governments, private interest groups and individual plaintiffs seeking to hold firearm manufacturers liable for the criminal misuse of firearms that "functioned as designed and intended" as improper attempts to regulate an already "heavily regulated" industry "through judgments and judicial decrees." 15 U.S.C. §§ 7901(a) (3), (4), (8). Congress, therefore, prohibited such claims from being "brought in any Federal or State court." 15 U.S.C. § 7902(a).

Under the plain and unambiguous terms of the PLCAA, a case that meets the definition of

a "qualified civil liability action" is barred. Congress defined a "qualified civil liability action" as follows:

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.

15 U.S.C. § 7903(5)(A). A "qualified product" includes "firearms as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18." 15 U.S.C. § 7903(4). Section 921(a)(3), in turn, defines a "firearm" to include "any weapon … which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3).

The PLCAA also defines those entitled to its protections—"manufacturers" and "sellers." A "manufacturer" is defined as "a person who is engaged in the business of manufacturing the [qualified] product in interstate commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18." 15 U.S.C. § 7903(2). A "seller" is defined as (1) an "importer (as defined in section 921(a)(9) of title 18)," (2) "a dealer (as defined in section 921(a)(11) of title 18)," or (3) "a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(a) of title 18)." 15 U.S.C. § 7903(6). Under the PLCAA, a "seller" of a "qualified product" does not include firearm manufacturers.

With these definitions in place, Congress created broad immunity for firearm manufacturers in "qualified civil liability actions," subject to certain limited exceptions. 15 U.S.C. §§ 7903(5)(A)(i)-(vi). A viable state law action that fits within an exception is not prohibited under the PLCAA. The enumerated exceptions material to Plaintiffs' claims are:

> (ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> (iii) an action in which a manufacturer or seller of a qualified product

> knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including --
>
> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make an appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted or conspired with any person in making any false entry or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any person to sell or otherwise dispose of a qualified product, knowing or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm under subsection (g) or (n) of section 922 of title 18;
>
> * * *
>
> (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that when the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. §§ 7903(5)(A)(ii), (iii), (v).

Notably, Congress made clear that the exceptions to PLCAA immunity do not "create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C). Thus, relevant state law must be examined to determine whether a plaintiff has pleaded a cause of action that fits within a narrowly defined exception to immunity.

2. This case meets the definition of a "qualified civil liability action" against a manufacturer of a "qualified product".

This case meets the prefatory definition of a "qualified civil liability action." It is a "civil action … against a manufacturer … for damages … resulting from the criminal or unlawful misuse" of a firearm by a "third party." 15 U.S.C. § 7903(5)(A). Plaintiffs allege Adam Lanza's actions were criminal, and it is clear that their damages resulted from his criminal misuse of a

firearm. (FAC at ¶¶ 204-206.) The question, then, is whether any of the claims pleaded against Remington fit within any of the enumerated exceptions to manufacturer immunity. They do not.

3. Plaintiffs have not sufficiently alleged a "negligent entrustment" claim against Remington.

i. The PLCAA prohibits a "negligent entrustment" action against a firearm manufacturer.

Plaintiffs allege that Remington manufactured and negligently entrusted the firearm, eventually used by Adam Lanza, to Camfour, a wholesale distributor of sporting goods located in Massachusetts. (FAC at ¶¶ 176, 224-225.) However, Congress limited the availability of a state law action for negligent entrustment of a firearm to actions against a "seller." *See* 15 U.S.C. §§ 7903(5)(A)(ii) (a qualified civil liability action [for which immunity exists] "shall not include … an action brought against a *seller* for negligent entrustment or negligence per se.") (emphasis added). As the plain language of the PLCAA makes clear, Remington was not a "seller" of the firearm used in the shooting. 15 U.S.C. § 7903(2). Indeed, as the Court noted in its Memorandum of Decision Re: Motions to Dismiss #119, #122, #125 (at n.4), Plaintiffs specifically allege that Riverview Sales and Camfour were "qualified product sellers within the meaning of 15 U.S.C. § 7903(6)." (FAC at ¶ 30, 36.) But Plaintiffs do not make that allegation as to Remington.

The omission of statutorily-defined "manufacturers" from the negligent entrustment exception was not a congressional oversight. Congress also omitted "manufacturers" from the definition of "negligent entrustment," which is defined as:

> [T]he supplying of a qualified product by a *seller* for use by another person when the *seller* knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

15 U.S.C. § 7903(5)(B) (emphasis added).

Legislative intent is reflected in the words used and the technical meaning given to those

words by the legislature. Conn. Gen. Stat. § 1-1. The words and their meaning make it clear that the PLCAA permits a "negligent entrustment" action only against one who acted as a statutorily-defined "seller" of the firearm used by the criminal to cause injury. A "seller" is defined in the PLCAA, in pertinent part, as

> [A] dealer (as defined in Section 921(a)(11) of Title 18) who is engaged in the business as such dealer in interstate or foreign commerce *and* who is licensed to engage in business as such a dealer under chapter 44 of Title 18.

15 U.S.C. § 7903(6)(B) (emphasis added).

Plaintiffs have not alleged that Remington sold the firearm to Camfour under a federal firearms dealer license.[3] Plaintiffs have also not alleged that Remington was "engaged in the business" as a dealer with respect to the firearm that was sold and shipped. Section 921(a)(11)(A) defines a "dealer," in pertinent part, as "any person engaged in the business of selling firearms at wholesale or retail." The phrase "engaged in the business" has its own technical meaning under Section 921. As applied to a "dealer" in firearms, a person is "engaged in the business" by:

> [D]evot[ing] time, attention, and labor to dealing in firearms as a regular course of trade or with the principal objective of livelihood and profit *through the repetitive purchase and resale of firearms,* but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

---

[3] A licensed manufacturer sells the firearms it manufactures from its premises under its manufacturer license. *See* 27 CFR § 478.41 ("[I]t shall not be necessary for a licensed importer or a licensed manufacturer to also obtain a dealer's license in order to engage in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured."). Plaintiffs' reliance on *Broughman v. Carver*, 624 F.3d 670, 677-78 (4th Cir. 2010), for the blanket proposition that a "manufacturer" and a "dealer" are not mutually exclusive is misplaced. *Broughman* merely stands for the proposition that one who has a dealer license but is also "engaged in the business" of manufacturing firearms must have a manufacturer's license in order to lawfully manufacture them. Any reliance by Plaintiff on the definition of "dealer" under National Firearm Act ("NFA") is also misplaced. Merely because Congress chose to distinguish between a "dealer" and "manufacturer" differently in the NFA than it did in the PLCAA, does not, turn a "manufacturer" of a firearm into its "seller" for purposes of assessing PLCAA immunity. *See* 26 U.S.C. § 5845(k) (under the NFA, "[t]he term 'dealer' means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans."). Regardless, the NFA and PLCAA definitions of a "dealer" are harmonious. They both define "dealer" to exclude manufacturers.

18 U.S.C. § 921(a)(21)(C) (emphasis added). When Remington sold the firearm it had manufactured to Camfour, it did not engage in the purchase and resale of the firearm. Thus, Remington did not sell the firearm to Camfour as a "dealer," as the term is defined in section 921(a)(11), or as a "seller," as defined in the PLCAA. Given that a "manufacturer" manufactures and sells and that a "seller" purchases and resells, under the PLCAA, a "manufacturer" of a firearm cannot also be the firearm's "seller" without eviscerating the distinction between the statutorily-defined terms. The technical meanings given to these terms in the PLCAA make them mutually exclusive. *See Kraiza v. Planning & Zoning Commission of the Town*, 121 Conn. App. 478, 492-93, 997 A.2d 583 (2010) (when a term is defined in the statute, common and ordinary usage is not considered).

Moreover, had Congress intended to make the "negligent entrustment" exception apply to both a "manufacturer" and a "seller," it could have done so, as it did in making other exceptions applicable to a "manufacturer or seller." *See, e.g.*, 15 U.S.C. § 7903(5)(A) ("The term 'qualified civil liability action' means a civil action or proceeding or an administrative proceeding brought by any person against a *manufacturer or seller* …."); 15 U.S.C. § 7903(5)(A)(iii) ("an action in which a *manufacturer or seller* of a qualified product knowingly violated … a statute applicable to the sale or marketing of the product…."); 15 U.S.C. § 7903(5)(A)(iii)(I) ("any case in which the *manufacturer or seller* knowingly made any false entry…."); 15 U.S.C. § 7903(5)(A)(iii)(II) ("any case in which the *manufacturer or seller* aided, abetted or conspired with another person….") (emphasis added throughout). Under Plaintiffs' interpretation, Congress need only have used the term "seller" in these other provisions to achieve the purpose of protecting both manufacturers and sellers from liability. But that is not what Congress did. The "negligent entrustment" exception stands apart because it is only intended to apply to the technically-defined "seller" of the

criminally-misused firearm.

The plain meaning rule requires that legislative intent first "be ascertained from the text of the statute." Conn. Gen. Stat. § 1-2z; *accord United States v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003) ("Statutory analysis begins with the plain meaning of the statute."). Any attempt by Plaintiffs to conflate the technical meaning given to "seller" and create ambiguity should be rejected. But assuming, for argument sake, that the definition of a "seller" in the PLCAA was somehow ambiguous, legislative history resolves any ambiguity because it plainly supports the interpretation that the "negligent entrustment" exception was not intended to reach manufacturers:

> One exception, for example, would purport to permit certain actions for "negligent entrustment". The bill goes on, however, to define "negligent entrustment" extremely narrowly. The exception applies only to sellers, for example, and would not apply to distributors or manufacturers no matter how egregious their conduct. Even as to sellers, the exception would apply only where the particular person to whom a seller supplies a firearm is one whom the sellers knows or ought to know will use it to cause harm.

151 Cong. Rec. S9071 (Sen. Feinstein) (reading from a letter signed by 50 law school professors).

> Nothing in this bill is intended to allow "leap frogging" over the gun dealer to the manufacturer. The negligent entrustment exception provision applies specifically to the situation where a dealer knows or reasonably should know that a dangerous person is purchasing a firearm with the intent to commit, and does commit a crime with the firearm. When a manufacturer has done nothing but sell a legal, non-defective product according to the law, the negligent entrustment provision would not allow bypass of the gun dealer to get to the deeper pockets of the manufacturer.

151 Cong. Rec. S9374 (Sen. Craig).[4] *See State v. Panek*, 2014 Conn. Super LEXIS 922, *14 (Conn. Super. Ct. Apr. 21, 2014) (despite finding plain and unambiguous meaning, the court examined legislative history and found it "fully consistent with the court's conclusion"). The text

[4] In their Sur-reply on the Motion to Dismiss, Plaintiffs misleadingly quoted Senator Craig's statements from volume "150" of the Congressional Record relating to a 2004 proposed version of the immunity law that was rejected by Congress, but not the PLCAA that was debated and enacted into law in 2005, *i.e.*, volume "151" of the Congressional Record.

of the PLCAA, its legislative history and related statutory provisions do not support a construction that Remington was a "seller" of the firearm used in the shooting under the PLCAA.

ii. Plaintiffs' allegations against Remington do not satisfy the PLCAA definition of negligent entrustment.

Even assuming, *arguendo*, that Remington is somehow considered a "seller" of the firearm under the PLCAA, its alleged actions do not meet the PLCAA definition of "negligent entrustment" because plaintiffs have not alleged that Camfour's resale of the firearm was a "use" of the firearm, under the PLCAA definition of negligent entrustment. 15 U.S.C. § 7903(5)(B). Remington is alleged to have sold the lawfully-manufactured firearm to Camfour, a federally-licensed wholesale distributor of firearms. Camfour's alleged actions with respect to the firearm – merely selling it to a federally-licensed retail dealer – cannot constitute a "use" of the firearm "involving an unreasonable risk of physical injury to the person or others." *Id*. If it did, then every firearm manufacturer and wholesale distributor would be exposed to the burdens of litigation, because all firearms are sold in commerce and are capable of being criminally misused. PLCAA immunity was created, in part, to protect firearm sellers against this very kind of claim.

The allegations in support of a negligent entrustment action must satisfy the following definition in order to survive PLCAA immunity:

> As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

15 U.S.C. § 7903(5)(B). This definition provides the minimum elements required to be pleaded in order to qualify for the negligent entrustment exception under the PLCAA. If the allegations in support of a negligent entrustment claim against a firearm seller do not reach the PLCAA's definitional "floor," the claim is a qualified civil liability action and it may not proceed. *Cf. Geier*

v. Am. Honda Motor Co., 529 U.S. 861, 870 (federal preemptive statute established a minimum standard, *i.e.*, a "floor"); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (holding that the preemption clause of the Food, Drug and Cosmetic Act relating to medical devices, 21 U.S.C. § 360k(a), preempts certain state law claims: "Petitioner's common-law claims are pre-empted because they are based upon New York 'requirement[s]' with respect to Medtronic's catheter that are 'different from, or in addition to' the federal ones, and that relate to safety and effectiveness, § 360k(a).").

Plaintiffs' allegations describe Remington's lawful sale of a lawfully-manufactured firearm to Camfour, a federally-licensed wholesale firearms distributor, which in turn sold the firearm to Riverview Sales, a federally-licensed firearms dealer. (FAC at ¶¶ 29-36.) Although Plaintiffs allege that each of these two lawful transactions was an "entrust[ment]" (*id*. at ¶¶ 176-78), they do not allege that either transaction was a "use" by Camfour or Riverview Sales of the product, under the PLCAA definition of negligent entrustment. Nor can the Court accept such an allegation because doing so would expose firearm manufacturers to liability under the guise of negligent entrustment for merely selling firearms later used in crime. Plaintiffs' theory—that a legal transaction between two federal firearm licensees involving a product that was lawfully manufactured, sold, owned and possessed in Connecticut creates liability on the manufacturer for harm by a criminal's misuse of the product—eviscerates the PLCAA. The theory would expose firearm manufacturers to negligent entrustment litigation every time a criminal uses a firearm to cause harm – regardless of the type of firearm used because all firearms can be alleged to be attractive to criminals. It is an absolute liability theory that the PLCAA was unquestionably enacted to prohibit.[5]

[5] Even prior to the enactment of the PLCAA, courts declined to impose such sweeping liability on firearm sellers. *Cf. Delahanty v. Hinckley*, 564 A.2d 758 (D.C. App. 1989) (rejecting strict liability claim against

iii. The rules of statutory construction require that a firearm "use" be narrowly defined to preserve the purpose of the PLCAA.

Congress did not intend that a manufacturer's sale of a lawfully manufactured firearm to a wholesale distributor could be a firearm "use" under § 7903(5)(B). Again, if such a transaction were sufficient to invoke the negligent entrustment exception, the other exceptions would be mere surplusage.

Plaintiffs' argument that the Court should adopt a "common law" meaning of "use" is not helpful to their position. First of all, there is no accepted common law meaning of the word "use." As the Supreme Court has recognized, "[m]ost words have different shades of meaning and consequently may be variously construed, not only when used in different statutes, but when used more than once in the same statute or even the same section." *Environmental Defense v. Duke Energy Corporation*, 549 U.S. 561, 574 (2007). The meaning of the word "use" as it appears in § 7903(5)(B) can only be understood by considering the context of the surrounding language in which it appears and the PLCAA as a whole. *See Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). Fundamental rules of statutory construction require that "use" be defined narrowly in recognition of the purpose of the PLCAA: to protect firearm sellers against claims arising from the criminal misuse of lawfully sold firearms. *See Commissioner v. Clark*, 489 U.S. 726, 739 (1989).[6]

Secondly, any suggestion that certain "congruence" between language found in the

---

manufacturer for the criminal use of a small, concealable handgun based on the theory that they have no social value); *Riordan v. International Armament Corp*., 132 Ill. App. 3d 642 (1985) (same); *Perkins v. F.I.E. Corp*., 762 F.2d 1250 (5th Cir. 1985) (same); *Moore v. R.G. Industries, Inc*., 789 F.2d 1326 (9th Cir. 1985) (same).

[6] The dictionary definition of "use" is the "act or practice of employing something" (WEBSTER'S NEW COLLEGIATE DICTIONARY, 1299 (1987)) or "to put or bring into action or service." BLACK'S LAW DICTIONARY 1382 (5th ed. 1979)). These definitions include affirmative acts of use, not passive shipment of products by a manufacturer to a wholesale distributor. Simply selling a firearm to Camfour is hardly "employing" a firearm or putting it into "action."

Restatement (Second) of Torts § 390 and § 7903(5)(B) was intentional on the part of Congress is pure speculation. In any event, the congruence between Section 390 and § 7903(5)(B) is not complete, which means that to the extent the drafters of the PLCAA considered Section 390, that Restatement Section's language did not fully reflect congressional intent to provide firearm sellers broad protection against claims arising from the criminal use of firearms they sell.

Restatement Section 390 contemplates that a supplier will incur liability for supplying "directly *or through a third person* a chattel for the use of *another* whom the supplier knows or has reason to know to be likely . . . to use [the chattel] in a manner involving unreasonable risk of physical harm to himself and others." Restatement (Second) of Torts § 390 (1965) (emphasis added). In contrast, PLCAA § 7903(5)(B) specifies that, in order to qualify for the negligent entrustment exception, the plaintiff must show that the firearm seller "knows, or reasonably should know, *the person to whom the product is supplied* is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B) (emphasis added). PLCAA § 7903(5)(B) is specific where Restatement Section 390 is general, *i.e.*, with regard to the class of persons whose "use" will potentially expose the product seller to liability. Under the PLCAA definition of negligent entrustment, this is a class of one: "the person to whom the product is supplied." 15 U.S.C. § 7903(5)(B). This distinction from Restatement Section 390—which permits liability to attach to the seller based on use of the chattel by "another"—plainly reflects Congress's intent to craft a narrow exception to the broad immunity from suit provided under the PLCAA.[7]

[7] In any event, each of the Illustrations to Section 390 involve a class of one—namely, the person to whom the product was supplied was the person who thereafter carelessly drove the car, operated the boat or discharged the firearm. None of the Illustrations involved a situation where the person to whom the product was supplied later on gave it to another person without the supplier's knowledge, and the other person thereafter used the product to cause harm.

Permitting negligent entrustment actions arising from the criminal use of a firearm by persons who are once, twice or three times removed from the manufacturer's initial sale would destroy the protections afforded by the PLCAA. Under Plaintiffs' expansive interpretation of "use," the initial lawful sale of any firearm, which passes through legal commerce and then is later used in crime, could be alleged to have been negligently entrusted. But there is no way to reconcile that interpretation with the purpose of the PLCAA—to protect firearm sellers from lawsuits arising from the criminal use of firearms.[8]

By the same token, there is no credible argument that Congress intended to preserve a cause of action against a firearm seller for a "successive entrustment" of an entire "class" of firearms, simply because a firearm in the "class" is later used in a crime. Indeed, the opposite is true. Congress was aware of lawsuits filed against firearms manufacturers, distributors and retail dealers alleging that they had entrusted firearms downstream in commerce to persons who were remote from the criminal use of the firearm and could not in any sense be found to have proximately caused the injuries claimed, and Congress enacted the PLCAA to extinguish such claims. *See* 15 U.S.C. § 7901(a)(7) ("The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States

[8] Interpreting the "negligent entrustment" exception to encompass only situations in which "the person to whom" the seller "suppl[ies]" the firearm is "the person" who thereafter "use[s]" the firearm to harm "the person or others," 15 U.S.C. § 7903(5)(B), reflects the reality that a seller who entrusts an instrumentality to a customer—whether a car, a firearm or other potentially dangerous instrumentality—can only assess the competency of the customer with whom it is dealing to use the instrumentality safely. *See Phillips v. Lucky Gunner, LLC*, No.14-cv-2822, 2015 U.S. Dist. LEXIS 39284, *19 (D. Colo. Mar. 27, 2015) (dismissing all claims against sellers as barred by the PLCAA, including a negligent entrustment claim: "the standard for negligent entrustment liability is narrower than the ordinary negligence standard because the manner in which the chattel is ultimately used is outside the supplier's control"). Extending liability under a negligent entrustment theory for the actions of persons unknown to the supplier, who later gain access to the instrumentality, eliminates the concept of "entrustment" from the cause of action altogether, and potentially leads to unlimited supplier liability. *See id.* at *19.

and do not represent a bona fide expansion of the common law."). An interpretation of the PLCAA that will allow the type of claims made in those cases to proceed would be directly at odds with the clear intent of Congress.

Ileto is an example of a "successive entrustment" case that Congress intended to preempt. There, the plaintiffs brought suit against the manufacturer and wholesale distributor of a handgun used in a mass shooting. The firearm changed hands multiple times before it reached the shooter, including a police department, a licensed retail dealer and two private gun collectors. *See Ileto v. Glock, Inc*., 421 F.Supp.2d 1274, 1280-81 (C.D. Cal. 2006). The Ninth Circuit looked to the PLCAA's legislative history and observed that "congressional speakers referred to *this very case* as the type of case they meant the PLCAA to preempt" and dismissed the plaintiffs' common law tort claims. *Ileto*, 565 F.3d at 1136 (emphasis in original).

Indeed, seventy-five law professors joined in the opinion that the PLCAA defines "negligent entrustment extremely narrowly" and prohibits claims for "successive entrustments":

> The exception applies only to sellers, for example, and would not apply to distributors or manufacturers, no matter how egregious their conduct. Even as to sellers, the exception would apply only where the particular person to whom a seller supplies a firearm is the one whom the seller knows or ought to know will use it to cause harm.

151 Cong. Rec. S9229 (July 28, 2005). The PLCAA should be interpreted in light of the purpose for which it was enacted: to stem the flood of litigation seeking to hold firearms suppliers responsible for the criminal misuse of firearms by remote third parties.

Plaintiffs' reliance on the Supreme Court's interpretation of "use" under § 924(c)(1) of the Gun Control Act in *Smith v. United States*, 508 U.S. 223 (1993), should be rejected. First of all, the same language in different statutes may be construed together only when the statutes are *in pari materia*. *Firstar Bank, N.A. v. Faul*, 253 F. 3d 982, 990 (7th Cir. 2001) (before construing

different statutes *in pari materia*, a court must determine that the purposes and subjects of the acts are in fact similar); *Lieberman v. FTC*, 771 F.2d 32, 40 (2d Cir. 1985) (even same term within different version of same statute is not *in pari materia* where goals of the statute changed). Section 924(c)(1) provides for enhanced punishment of persons convicted of carrying or using a firearm "during or in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1). In *Smith*, the defendant was found to have "used" a firearm under § 924(c)(1) when he traded a firearm for drugs. *Smith*, 508 U.S. at 226. The Court held that the act of trading a firearm for drugs can be a firearm "use" for the purpose of § 924(c)(1).

Secondly, in *Bailey v. United States*, 516 U.S. 137 (1995), a subsequent decision further addressing the meaning of "use" under § 924(c)(1), the Court held that although a "use" under § 924(c)(1) can include "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm," a defendant cannot be charged for merely storing a firearm near drugs. *Id*. at 149. "Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession." *Id*. Thus, *Bailey* establishes that, even under the expansive interpretation of a firearm "use" in *Smith*, Camfour did not "use" the firearm by merely possessing and then selling it to Riverview Sales. Nor did Riverview Sales "use" the firearm when it sold it to Nancy Lanza. And Nancy Lanza did not "use" the firearm by merely possessing it in her home.

In sum, the PLCAA prohibits a wide variety of claims against firearm manufacturers and sellers, and only permits specifically enumerated others. However, Plaintiffs' primary allegations against Remington in this case—that a firearm manufacturer acted tortiously by making a lawful sale of a commonly purchased firearm to a law abiding, federally-licensed wholesale distributor—is prohibited by the PLCAA.

4. Plaintiffs have not pleaded (and cannot plead) a knowing violation of a statute "applicable to the sale or marketing" of firearms.

i. CUTPA does not qualify as a predicate statute under the plain meaning of the PLCAA text and guiding precedent.

An action in which a firearm manufacturer "knowingly violated a State or Federal statute applicable to the sale or marketing" of a qualified product and "the violation was a proximate cause of the harm for which relief is sought" is an exception to PLCAA immunity. 15 U.S.C. § 7903(5)(A)(iii) (referred to as the "predicate exception"). CUTPA is a remedial statute of general application. Congress did not intend that alleged violations of this kind of statute were to serve as exceptions to PLCAA immunity.

Application of the plain meaning rule to the PLCAA requires a finding that the type of statutes Congress had in mind as predicate statutes under § 7903(5)(A)(iii) are those that Congress specifically enumerated as examples in the text of the predicate exception itself, and other similar statutes that also "actually regulate the firearms industry." *City of New York v. Beretta*, 524 F.3d 384, 402-03 (2d Cir. 2008). This interpretation does not "yield absurd or unworkable results" but is entirely consistent with the overall purpose of the PLCAA: to provide immunity to firearm manufacturers who conduct their manufacturing activities in accordance with the myriad federal, state and local laws applicable to their highly-regulated businesses. *See* Conn. Gen. Stat. § 1-2z; *see Heim v. Zoning Board of Appeals*, 288 Conn. 628, 637, 953 A.2d 877 (2008) ("We must always construe a regulation in light of its purpose.") (citing *West Hartford Interfaith Coalition v. Town Council*, 228 Conn. 498, 508 (1994) ("[a] statute should not be construed to thwart its purpose.")).

As explained by the Second Circuit in *City of New York*, the predicate exception encompasses only those statutes that "expressly regulate firearms" or "that clearly can be said to implicate the purchase and sale of firearms." 524 F.3d at 403 (holding that the New York criminal

nuisance statute was not "applicable to the sale or marketing of firearms"); *Ileto*, 565 F.3d at 1135-36 (finding it "likely that Congress had in mind only ... statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry – rather than general tort theories that happened to have been codified by a given jurisdiction").

The existence of myriad laws relating to the manufacture, marketing, sale and ownership of firearms was recognized by Congress. In enacting the PLCAA, Congress expressly found that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws." 15 U.S.C. § 7901(a)(4). Indeed, at the federal level, statutes and regulations touch on virtually all aspects of firearms manufacture, ownership and use. *See, e.g.*, 18 U.S.C. § 921 *et seq*. (Gun Control Act of 1968) and regulations promulgated thereunder, 27 CFR Part 478 (Commerce in Firearms and Ammunition); 26 U.S.C. § 5801 *et seq*. (National Firearms Act) and regulations promulgated thereunder, 27 CFR Part 479 (Machine Guns, Destructive Devices and Certain Other Firearms); and 28 CFR Part 25 (National Instant Criminal Background Check System). However, federal law does not occupy the field to the exclusion of state and local laws. 18 U.S.C. § 927 (Federal firearms laws do not "operate[] to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict ... so that the two cannot be reconciled or consistently stand together.").

Most states, including Connecticut, also regulate the manufacture, sale and ownership of firearms. *See*, *e.g.*, Conn. Gen. Stat. § 29-28 *et seq*. (permit for sale at retail of pistol or revolver); Conn. Gen. Stat. § 29-33 (sale, delivery or transfer of pistols and revolvers); Conn. Gen. Stat. § 29-37a (sale or delivery at retail of firearm other than pistol or revolver); Conn. Gen. Stat. § 29-37b (retail dealer to equip firearms with locking device at time of sale and warn of consequence of unlawful storage); Conn. Gen. Stat. § 53-202a (permitted rifle, shotgun and pistol designs);

Conn. Gen. Stat. § 53-202b (sale or transfer of assault weapons); Conn. Gen. Stat. § 53-202c (possession of assault weapons); Conn. Gen. Stat. § 53-202d (certification of possession of assault weapons); Conn. Gen. Stat. § 53-202f (transportation of assault weapons). Some states, including Massachusetts, Maryland and California, dictate firearm designs by statute, specifying the mechanical safety features of firearms. *See* Cal. Pen. Code § 12126; Mass. Gen. L. § 131K; Md. Code § 5-132.[9]

Although many firearms regulations do not expressly reference the "sale or marketing" of firearms, most can be said to "implicate" the sale or marketing of firearms by, for example, dictating what types of firearms may be lawfully possessed and who may lawfully possess them. *See Gilland v. Sportsmen's Outpost, Inc.*, 2011 Conn. Super. LEXIS 1320, *20 (Conn. Super. Ct. May 26, 2011) (illustrating the type of statutes, both federal and state, that Congress intended to serve as predicate statutes under § 7903(5)(A)(iii), including 18 U.S.C. § 922(b)(2) (sales prohibited to certain persons), and Conn. Gen. Stat. §§ 29-31 (pertaining to display of permits to sell and record sales of pistols and revolvers), 29-33 (pertaining to the sale, delivery, or transfer of pistols and revolvers), 29-361 (pertaining to verification of eligibility of persons to receive or possess firearms, the State database, the instant criminal background check and related issues)). Remington is not alleged to have violated any of these regulations.

Congressional intent is plainly reflected in the two examples of predicate statutes set forth in § 7903(5)(A)(iii). The examples include statutes dictating the records to be kept by sellers with respect to firearm sales and statutes prohibiting seller complicity in illegal firearm sales. 15 U.S.C.

[9] Firearm laws applicable to the sale and marketing of firearms are also found at the local level. In Connecticut, for example, Bridgeport, Hartford and New Haven are municipalities with laws addressing firearms sales and ownership. *See* Bridgeport Municipal Code, Title 9, Ch. 9.16; Municipal Code of Hartford, Ch. 21, Art. II; New Haven Code of Ordinances. Ch. 18; *see also ATF State Laws and Published Ordinances*, available at: www.atf.gov/file/58536/download (last visited Apr. 19, 2016).

§§ 7903(5)(B)(iii)(I) & (II). In its analysis of whether the New York nuisance statute was the type of statute Congress intended to serve as a predicate statute, the Second Circuit in *City of New York* looked to these examples and applied two canons of statutory construction: *noscitur a sociis* (meaning of one term may be determined by reference to terms it is associated with) and *ejusdem generis* (general words should be limited to things similar to those specifically enumerated). *City of New York*, 524 F.3d at 401. The court held that a nuisance statute could not serve as a predicate statute under the PLCAA because it was not similar or related to the enumerated examples. Indeed, the court in *Ileto* reasoned that "there would be no need to list examples at all" if "*any* statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute." *Ileto*, 565 F.3d at 1134 (emphasis in original).[10]

The same analysis compels one conclusion in this case: that Congress did not intend for general state unfair trade practice statutes, such as CUTPA, to serve as predicate statutes under § 7903(5)(B)(iii). *See Webster Bank v. Oakley*, 265 Conn. 539, 555 n.16, 830 A.2d 139 (2003) ("[T]he decisions of the Second Circuit Court of Appeals carry particular persuasive weight in the interpretation of federal statutes in Connecticut state courts … [and] that court's decisions may be

[10] The example provided in § 7903(5)(B)(iii)(II) specifically refers to aiding and abetting violations of Section 922(g) and (n) of the Gun Control Act, which identify the categories of persons who are prohibited from purchasing firearms. The example provided in § 7903(5)(B)(iii)(I) sets forth language found in Sections 922(m) of the Gun Control Act, which makes it unlawful for sellers to knowingly fail to maintain required record of firearm sales or make false entries in those records. Indeed, in their Objection to the Motion to Dismiss, Plaintiffs endorsed use of the *ejusdem generis* rule to interpret the predicate exception, but rejected the conclusion reached by the court in *City of New York* based on the rule. (Pls.' Obj. at 38-39.) In any event, the Second Circuit's application of *ejusdem generis* was within the parameters of the plain meaning rule because it did not require leaving the text of the statute itself to determine meaning. And resort to the rule is not dependent on an initial finding of ambiguity. *See Town of Stratford v. Jacobelli*, 317 Conn. 863, 873-75, 120 A.3d 500 (2015) (using *ejusdem generis* rule to find clear and unambiguous meaning). Under the rule, the specific examples of statutes "applicable to the sale or marketing" of firearms included in the predicate exception help shape the more general description of predicate statutes. *See id*. at 872 ("[W]here a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to…things of the same general kind or character as those specified in the particular enumeration.").

more helpful to us if we follow the same analytical approach to federal statutory interpretation that it does."). As a result, the predicate statute analyses undertaken by the Second Circuit is particularly persuasive. *Gilland*, 2010 Conn. LEXIS 142, at *14-15.

ii. Congress did not intend for a statute of general application to serve as a predicate statute under Section 7903(5)(A)(iii).

CUTPA does not expressly regulate or clearly implicate the regulation of firearms. *See* Conn. Gen. Stat. § 42-110g. To the contrary, CUTPA is a remedial statute of general application that creates an action to recover an "ascertainable amount of money or property" resulting from unfair or deceptive business practices. The CUTPA liability scheme is "expansive." *Associated Inv. Co. Ltd. Partnership v. Williams Assoc. IV*, 230 Conn. 148, 156, 645 A.2d 505 (1984). CUTPA embraces a much broader range of business conduct than common law tort actions. *Sportsmen's Boating Corp., v. Hensely*, 192 Conn. 148, 156, 645 A.2d 505 (1994). CUTPA is a broad, remedial statute and is not the type of statute "Congress had in mind" when carving out a narrow statutory violation exception to the broad immunity afforded by the PLCAA. *Ileto*, 565 F.3d at 1135-36. And because it is a fundamental rule of statutory construction that statutory exceptions are to be narrowly construed to preserve the primary purpose of the statute, CUTPA cannot be reconciled with congressional intent to protect firearm manufacturers from litigation. A statutory exception is *not* to be construed so broadly that it defeats the primary purpose of the statute. *Clark*, 489 U.S. at 739; *Hartford v. Freedom of Information Commission*, 210 Conn. 421, 431, 518 A.2d 49 (1986) (exceptions to FOIA disclosure must be narrowly construed to preserve policy favoring public disclosure).

Much like CUTPA, the nuisance statute at issue in *City of New York* is also a statute of general application. It prohibits conduct that endangers the public that is alleged to be "unreasonable under all the circumstances." N.Y. Penal Law § 240.45. The Second Circuit,

relying on the overall purpose of the PLCAA, well-established canons of statutory construction, and legislative history, held that the New York nuisance statute did not "fall within the predicate exception to the claim restricting provisions of the PLCAA." *City of New York*, 524 F.3d at 399. The court's reasoning was straightforward: the New York nuisance statute was not the type of statute Congress intended to serve as a predicate statute because it neither "expressly regulat[ed]" nor could "clearly . . . be said to implicate" the sale or marketing of firearms. 524 F.3d at 403. The court expressly rejected an interpretation of "applicable to" to mean "capable of being applied" because it was a "too-broad reading of the predicate exception." *Id*. at 402. Such an interpretation would be an "absurdity" because it "would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets." *Id*. at 401-02.[11]

The analysis of whether CUTPA can serve as a predicate statute under § 7903(5)(A)(iii) should be consistent with the analysis performed by the Second Circuit in *City of New York*. Both statutes are statutes of general applicability capable of being applied to a broad spectrum of impermissible commercial conduct. CUTPA broadly focuses on "unfair or deceptive" conduct causing commercial harm. Conn. Gen. Stat. § 42-110b(a). The New York nuisance statute is equally broad, prohibiting "conduct . . . unreasonable under all the circumstances." N.Y. Penal Law § 240.45(1). Neither statute expressly references the sale or marketing of firearms. And although the court in *City of New York* stated in *dicta* that a predicate statute need not necessarily "expressly refer to the firearms industry," 524 F.3d at 400, it specifically held that "construing the term 'applicable to' to mean statutes that clearly can be said to regulate the firearms industry more

[11] The dictionary definition of "implicate" is "to be involve[d] in the nature or operation of something." WEBSTER'S NEW COLLEGIATE DICTIONARY, 605 (1987). It is difficult to envision a statute being "applicable to the sale or marketing of firearms" without some aspect of firearms-related activity being inherent in the statute's purpose or basic to its operation.

accurately reflects the intent of Congress." *Id*. at 401. The court had little difficulty finding that § 7903(5)(A)(iii) did "not encompass" the New York nuisance statute. *Id*. at 403.

In reaching the same conclusion, the Ninth Circuit in *Ileto*, 565 F.3d at 1136-37, found that legislators' "unanimously expressed understanding" that "sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations" was in "complete harmony" with the purpose and text of the PLCAA. *Ileto*, 565 F.3d at 1137. The court stated:

> We make two general observations from our review of the extensive legislative history of the PLCAA. First, all of the congressional speakers' statements concerning the scope of the PLCAA reflected the understanding that manufacturers and sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations. *See, e.g*., 151 Cong. Rec. S9087-01 (statement of Sen. Craig) ("This bill does not shield [those who] . . . have violated existing law . . . and I am referring to the Federal firearms laws."); *id*. S9217-02 (statement of Sen. Hutchison) ("[Lawsuits] would also be allowed where there is a knowing violation of a firearms law."); *id*. (statement of Sen. Craig reading a *Wall Street Journal* article) ("The gun makers . . . would continue to face civil suits for defective products or for violating sales regulations."); *id*. (statement of Sen. Reed in opposition to the PLCAA) ("We will let [plaintiffs] proceed with their suit if there is a criminal violation or a statutory violation, a violation of regulations, but for the vast number of other responsibilities we owe to each other, that are defined for the civil law, one will not have the opportunity to go to court."); *id*. S8927-01 (statement of Sen. Reed) (stating that the PLCAA would not apply to violations of "statutes related to the sale or manufacturing of a gun"); *id*. S9246-02 (statement of Sen. Santorum) ("This bill provides carefully tailored protections that continue to allow legitimate suits based on knowing violations of Federal or State law related to gun sales.").

Id. at 1136-37; *see also City of New York*, 524 F.3d at 402-03 ("[W]e think that the [congressmen's] statements nevertheless support the view that the predicate exception was meant to apply only to statutes that actually regulate the firearms industry, in light of the statements' consistency amongst each other and with the general language of the statute itself."); *see State v. Courchesne*, 296 Conn. 622, 669, 998 A.2d 1 (2010) (holding that when a statute is not plain and unambiguous, the legislative history, the circumstances surrounding the statute's enactment, and the legislative

policy the statute was designed to implement is examined).

The argument that a statute merely *capable of being applied* to the sale or marketing of firearms is sufficient to bring a cause of action within the predicate exception has been flatly rejected by the Second Circuit, and all other courts that have addressed the issue. *See City of New York*, 524 F.3d at 402 (finding this "a far too broad reading of the predicate exception"); *accord Ileto*, 565 F.3d at 1126 ("Indeed, if any statute that 'could be applied' to the sales and manufacturing firearms qualified as a predicate statute, there would be no need to list examples at all."). There is simply no way to shoehorn an expansive CUTPA action into the narrow Section 7903(5)(A)(iii) exception without ignoring precedent and congressional intent. *See, e.g.*, *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 171 (D.C. App. 2008) ("Shoehorning, as it were, into the predicate exception [the D.C. Assault Weapons Manufacturing Strict Liability Act] that, at bottom, simply shifts the cost of injuries resulting from the discharge of lawfully manufactured and distributed firearms would, in our view, 'frustrate Congress's clear intention.'").[12]

In *City of New York*, the plaintiff broadly complained about the sales and marketing practices of the defendant handgun manufacturers, claiming that their practices helped create a criminal marketplace for firearms. In *dicta*, the court in *City of New York* "declin[ed] to foreclose

[12] In *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. App. 2007), an Indiana appellate court found that the Indiana nuisance statute was "applicable" to the sale or marketing of firearms and could serve as a predicate statute under § 7903(5)(A)(iii), but did so for reasons not present here. The court's ruling was based on a pre-PLCAA decision in the case by the Indiana Supreme Court, which held that defendants' alleged violations of Indiana statutes "specifically applicable to the sale or marketing of firearms" gave rise to a statutory public nuisance claim. *Id*. at 430-32 ("Thus, even assuming that the PLCAA requires an underlying violation of a statute directly applicable to the sale or marketing of a firearm, the City has alleged such violations in their complaint."). In contrast, Plaintiffs here have not alleged that Remington violated any laws directly applicable to the sale or marketing of firearms. Moreover, the court in *City of Gary* relied on an interpretation of "applicable" by the district court in *City of New York* to mean "capable of being applied" (*id*. at 431), which has since been overruled and rejected by the Second Circuit as "a far too-broad reading of the predicate exception." *City of New York*, 524 F.3d at 384.

the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id*. at 399. The court's *dicta*, however, should be viewed in light of the court's holding, in which it "foreclose[d] the possibility" that the New York state nuisance statute could serve as a predicate statute under § 7903(5)(A)(iii). The court did not provide any further guidance as to what other type of "statute of general applicability" might qualify as a predicate statute, what "circumstances" might exist to conclude that Congress intended for such a statute to serve as a predicate, or whether it was the "specific conduct that the City complain[ed] of" that led to the court's *dicta*. Without more, the *dicta* is just that—a statement that is not binding in subsequent cases. *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999) (dictum not binding).

iii. Recognition of CUTPA as a predicate statute applicable to the sale or marketing of firearms will render other enumerated exceptions to immunity superfluous.

Permitting CUTPA to serve as a predicate statute would eviscerate congressional intent to provide immunity to firearm manufacturers from lawsuits arising from the criminal misuse of firearms. It would also render the other exceptions to immunity unnecessary, including the breach of contract or warranty, negligent entrustment and negligence *per se* exceptions. *See* 15 U.S.C §§ 7903(5)(A)(ii), (iv). "Statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." *Housatonic R.R. Co. v. Comm'r of Revenue Servs*., 301 Conn. 268, 303, 21 A.2d 759 (2011) (citing *Semerzakis v. Comm'r of Soc. Servs*., 274 Conn. 1, 18, 873 A.2d 911 (2005) (Courts are to presume "the legislature did not intend to enact meaningless provisions.")). In order to avoid PLCAA immunity, a person harmed by a criminal use of a firearm would have no reason to plead and take on a burden of proving anything more than a firearm manufacturer acted "unfairly" under CUTPA. Firearm manufacturers will find

themselves immersed in litigation based on allegations that their lawful manufacture and sale of firearms was nevertheless morally or ethically wrong and caused harm. The PLCAA was enacted to provide firearm manufacturers immunity for this very type of claim.

CUTPA is not the type of statute Congress intended to serve as a predicate statute under § 7903(5)(A)(iii) for an additional reason. Under CUTPA, a plaintiff need not prove defendant's actual or constructive knowledge that its actions were wrongful and caused harm. *See Normand Josef Enters. v. Connecticut Nat'l Bank*, 230 Conn. 486, 523, 646 A.2d 1289 (1994) ("a party need not prove an intent to deceive to prevail under CUTPA"). In contrast, under § 7903(5)(A)(iii), there must be proof that the predicate statute was "knowingly violated" by the defendant. Recognition of CUTPA and its expansive business/consumer remedial scheme as a predicate statute under § 7903(5)(A)(iii) would directly undermine congressional intent to provide broad immunity to firearm manufacturers who have not "knowingly violated" a statute applicable to the sale or marketing of firearms.

5. The PLCAA prohibits a product liability action where the discharge of the firearm was the result of a volitional criminal act.

The Connecticut Product Liability Act ("CPLA") provides the exclusive remedy for all "claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product." Conn. Gen. Stat. § 52-572m. Although Plaintiffs have denied doing so (to try and avoid "exclusivity"; *see* Arg. B.4., *infra*), they have plainly pleaded a product liability claim against Remington. They allege Remington wrongfully marketed and sold the rifle to the civilian market with knowledge that it posed an unreasonable risk of physical injury to others. (*See, e.g.*, FAC at Count One, ¶ 213.) Plaintiffs further allege that the utility of the rifle for lawful use was outweighed by the risk of its unlawful

use. (*Id*. at Count One, ¶ 217.) And Plaintiffs allege that Remington's conduct in marketing the firearm for civilian use was a "substantial factor resulting in" their damages. (*Id*. at Count One, ¶ 227.) Under Connecticut law, these are product liability allegations, and if brought at all, must be brought under the CPLA. *See Fraser v. Wyeth, Inc.*, 857 F.Supp.2d 244, 258 (D.Conn. 2012); *Hurley v. Heart Physicians, P.C.*, 278 Conn. 305, 326, 898 A.2d 777, 789 (2006).

Although an exception to PLCAA immunity exists for a product liability action against a firearms manufacturer, such an action is *not* available "where the discharge of the [firearm] was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). Under such circumstances, the volitional criminal act is "considered the sole proximate cause of the resulting death, personal injuries or property damage." *Id*. Here, Plaintiffs have clearly alleged Adam Lanza intentionally discharged the firearm. (*See* FAC at ¶¶ 201-07.) His actions were undeniably criminal. *See Adames v. Sheahan*, 909 N.E.2d 742, 761-62 (Ill. 2009) (holding that a criminal conviction is not required to find that the volitional discharge of a firearm prohibits a product liability action under the PLCAA). In accordance with the plain terms of the PLCAA exception regarding product liability suits, Adam Lanza's criminal actions were the "sole proximate cause" of deaths and injuries he inflicted. Claims that Remington's design, marketing and sale of the firearm used by Lanza caused Plaintiffs' damages are prohibited by the PLCAA.[13]

---

[13] Remington would have a defense to these types of claims even in the absence of the immunity provided by the PLCAA. Before the PLCAA was enacted, courts routinely dismissed cases against firearm manufacturers for damages resulting from the criminal discharge of firearms that *functioned as they were designed and intended to function*. *See Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989) (dismissing claim alleging that "Saturday Night Special" was useful for criminal purposes and manufacturer's marketing of firearm was an abnormally dangerous activity); *Linton v. Smith & Wesson*, 469 N.E.2d 339 (Ill. App. 1984) (finding no duty on the part of manufacturer of non-defective firearm to control distribution to the general public); *Riordan v. International Armament Corp*., 477 N.E.2d 1293 (Ill. App. 1985) (dismissing claim alleging that manufacturer of concealable, inexpensive handgun was strictly liable because the gun "served no useful social purpose"); *Perkins v. F.I.E. Corp*., 762 F.2d 1250 (5th Cir. 1985) (holding that manufacture of small caliber handguns is not an ultra-hazardous activity); *Mavilia v. Stoeger Industries*, 574 F.Supp. 107 (D. Mass. 1983) (dismissing claim against manufacturer based on negligent marketing and distribution of an alleged inherently defective product); *Patterson v. Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985)

B. Plaintiffs' CUTPA claims against Remington fail under Connecticut law.

Plaintiffs fail to allege that they had a business relationship with Remington or suffered financial injuries, and their CUTPA claims are barred by the three-year statute of limitations, the "exclusivity" clause of the CPLA and the § 42-110c(a) exemption.

1. Plaintiffs do not have the requisite relationship with Remington.

CUTPA does not provide protection for persons who do not have a consumer or commercial relationship with the alleged wrongdoer. While a plaintiff need not allege a "consumer relationship" with a defendant in order to assert a CUTPA claim, *see Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 498 (1995), the Connecticut Supreme Court has rejected the proposition that "a CUTPA plaintiff is not required to allege *any* business relationship with the defendant." *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157 (2005) (emphasis added); *see also Pinette v. McLaughlin*, 96 Conn. App. 769, 778 (2006) ("Although our Supreme Court repeatedly has stated that CUTPA does not impose the requirement of a consumer relationship, the court also has indicated that a plaintiff must have at least *some* business relationship with the defendant in order to state a cause of action under CUTPA.") (internal citation omitted).

Connecticut courts have recognized only three categories of persons who have suffered financial injury to have standing under CUTPA: (1) consumers, (2) competitors, and (3) other business persons with a consumer or commercial nexus to the alleged wrongdoer. *Provost-Daar v. Merz N. Am., Inc.*, No. CV136037872S, 2014 Conn. Super. LEXIS 411, *7-8 (Conn. Super. Ct. Feb. 24, 2014); *Caltabiano v. L&L Real Estate Holdings II, LLC*, No. CV074019729S, 2009 Conn. Super. LEXIS 817, *19-20 (Conn. Super. Ct. Mar. 20, 2009), *aff'd sub nom.*, *Caltabiano v. L & L*

(dismissing claim alleging that handguns pose risks of injury and death that outweigh social utility); *Martin v. Harrington & Richardson, Inc*., 743 F.2d 1200 (7th Cir. 1984) (dismissing claim alleging that sale of handguns is an ultra-hazardous activity); *Armijo v. Ex Cam, Inc*., 843 F.2d 406 (10th Cir. 1988) (same).

Real Estate Holdings II, LLC, 128 Conn. App. 84, 15 A.3d 1163 (2011). Plaintiffs do not fall into any of the categories. They were not "consumers" of Remington's products, nor were they business competitors or in any type of commercial relationship with Remington. Put simply, Plaintiffs do not allege a relationship with Remington that provides an actionable CUTPA claim.

2. Plaintiffs do not seek financial damages against Remington.

Plaintiffs do not seek the sort of relief CUTPA affords. CUTPA may be used to recover damages for financial injury, but not damages flowing from personal injury or wrongful death. *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 129-30 (2003); *cf. Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 34 (1997) (although "entrepreneurial and commercial" aspects of medical profession are covered by CUTPA, medical negligence claims for personal injury damages are not covered). Plaintiffs' claims against Remington seek personal injury and wrongful death damages wholly unconnected to a business relationship, and therefore should be stricken. *See Vacco v. Microsoft Corp.*, 260 Conn. 59, 88 (2002) ("[W]e previously have stated that 'it strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable harm, caused by any person in the conduct of any trade or commerce.'").

3. Plaintiffs' CUTPA claims are barred by the statute of limitations.

Even if Plaintiffs had the requisite commercial relationship with Remington and alleged financial losses, their claims are time-barred by the applicable three-year statute of limitations. Conn. Gen. Stat. § 42-110g(f). The three-year limitation period applicable to CUTPA claims begins to run upon the occurrence of defendant's alleged violation, not its discovery. *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 213, 541 A. 2d (1988). Here, Plaintiffs filed their original Complaint on December 13, 2014, more than three years after they allege that Remington manufactured and sold the firearm, *i.e.*, "sometime prior to March 2010." (FAC at ¶ 176.)

Because the Complaint makes clear that these alleged acts occurred more than three years before this lawsuit was commenced, Plaintiffs' CUTPA claims are time-barred.

Reliance on *Pellecchia v. Conn. Light & Power Co.*, 52 Conn. Supp. 435, 445, 54 A.3d 1080, 1089 (Conn. Super. Ct. 2011), for the proposition that the Wrongful Death statute's limitations period trumps the CUTPA statute of limitations is misplaced. In *Pellecchia*, the defendant moved to dismiss a wrongful death claim, brought under various theories of liability, including CUTPA, because the plaintiff's lawsuit was untimely under the Wrongful Death statute's two-year limitation. To avoid dismissal, the plaintiff invoked the limitations period found in "accidental failure of suit statute, § 52-592." The trial court rejected plaintiff's argument, finding that the wrongful death statute's two-year limitation period was a "jurisdictional prerequisite" that had to be satisfied. *Id*. at 444-45. The court did not need to address whether the CUTPA "jurisdictional prerequisite" limitation period (three-years from the act complained of) also needed to be satisfied. Logically, to the extent that wrongful death damages are somehow recoverable under CUTPA, the jurisdictional prerequisite of both statutory actions would have to be met.[14]

4. The CPLA "exclusivity" provision bars Plaintiffs' CUTPA claim against Remington for personal injury and wrongful death damages.

Under the CPLA, a "product liability claim" includes all "claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging

[14] There is a superior court split as to whether CUTPA survives death. *Compare Touchette v. Smith*, 1993 Conn. Super. LEXIS 2644 (Conn. Supr. Ct. 1993), *with Abbhi v. AMI*, 1997 Conn. Super. LEXIS 1523 (Conn. Supr. Ct. 1997). In any event, courts have applied the three-year statute of limitations to bar CUTPA claims pleaded as part of a wrongful death lawsuit. *See, e.g.*, *Wilson v. Midway*, 198 F. Supp. 2d 167 (Dist. Conn. 2002) (holding that a parent of a deceased minor's CUTPA claim based on "marketing" practices of the defendant video game maker allegedly caused minor's stabbing death was time barred by CUTPA's 3-year limitation). Regardless, there can be no dispute that Plaintiff Natalie Hammond's CUTPA claim for personal injury damages is time barred.

or labeling of any product." Conn. Gen. Stat. § 52-572m. Further, a product liability claim brought under the CPLA "shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product." Conn. Gen. Stat. § 52-572n; *see Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 126, 818 A.2d 769, 773 (Conn. 2003) ("The exclusivity provision makes the product liability act the exclusive means by which a party may secure a remedy for an injury caused by a defective product.").

In *Gerrity*, the plaintiff sued a "light" cigarette manufacturer, claiming both wrongful death and financial damages under product liability and CUTPA theories. 263 Conn. at 123. Plaintiff alleged defendant's deceptive marketing of the "light" cigarettes caused "financial" losses because her decedent paid more for cigarettes. 263 Conn. at 130. The court in *Gerrity* held that to the extent plaintiff alleged wrongful death, personal injury or property damage from defendant's deceptive marketing of "light" cigarettes, such claims fell under the CPLA exclusivity provision. *Id*. at 126-28. But the plaintiff's CUTPA claim was "not one for personal injuries death or property damage" traditionally sought in product liability actions. *Id*. at 131-32. Instead, "[t]he *financial injury* … for which the plaintiff seeks to use CUTPA to provide a remedy, cannot reasonably be construed to be a claim for 'personal injury, death or property damage'[.]" *Id*. at 130-31 (emphasis in original). On that basis, the court held that the plaintiff's CUTPA claim for financial losses was not barred by the CPLA exclusivity provision.

In contrast, Plaintiffs here seek wrongful death and personal injury damages allegedly resulting from product design and marketing, not "financial" losses resulting from a consumer/business relationship with Remington. As a result, Plaintiffs' CUTPA claims against Remington are barred by the CPLA's exclusivity provision.[15]

[15] *See Fraser v. Wyeth, Inc.*, 857 F.Supp.2d 244, 258 (D.Conn. 2012) (holding that the CPLA's exclusivity provision barred "CUTPA claims that assert that a defendant's product is defectively designed"); *Hurley v.*

5. Section 42-110c(a) exempts Remington's "transaction" from CUTPA liability.

CUTPA does not apply to "[t]ransactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States." Conn. Gen. Stat. § 42-110c(a); *Connelly v. Hous. Auth. of New Haven*, 213 Conn. 354, 361-65 (1990) (applicability of CUTPA, including § 42-110c exemption, is a question of law, not fact). Plaintiffs allege a violation of CUTPA by Remington, a federally-licensed and regulated manufacturer of firearms, based on its sale of the XM-15 rifle to Camfour, a federally-licensed and regulated wholesale distributor of firearms. The rifle was then sold to Riverview Sales, a federally-licensed and regulated retailer of firearms, which, in turn, sold it to Nancy Lanza, a civilian in Connecticut. (*See* FAC at ¶¶ 29-36, 176-178, 182.) Each of these sales transactions were permitted under federal law and were governed by regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). (*See* FAC at ¶¶ 107, 159, 162, 176-178.) In addition, the sale of the firearm to Nancy Lanza was expressly permitted by the Federal Bureau of Investigation ("FBI"), which performed a background check as required by ATF regulations, and approved the sale. Plaintiffs do not allege that the sales between the licensed manufacturers and sellers, or the FBI's approval of the sale to Nancy Lanza, were not permitted transactions under regulatory law. (*See* FAC at ¶¶ 159, 162, 176-178, 182, 29-36.) Based on what Plaintiffs have pleaded, their CUTPA claims fit squarely within the exemption and should be stricken.

CONCLUSION

For the above-stated reasons, Remington respectfully requests that Court strike Counts 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, and 31 of Plaintiffs' First Amended Complaint.

Heart Physicians, P.C., 278 Conn. 305, 326, 898 A.2d 777, 789 (2006) (finding that plaintiffs' CUTPA claim fell "within the scope of the liability act and thus [was] barred by the exclusivity provision).

Dated: April 22, 2016.

THE DEFENDANTS,

REMINGTON ARMS CO., LLC and
REMINGTON OUTDOOR COMPANY, INC.

BY:/s/ Scott M. Harrington/#307196

Jonathan P. Whitcomb
Scott M. Harrington
DISERIO MARTIN O'CONNOR &
CASTIGLIONI LLP #102036
One Atlantic Street
Stamford, CT 06901
(203) 358-0800
jwhitcomb@dmoc.com
sharrington@dmoc.com

James B. Vogts (pro hac vice #437445)
Andrew A. Lothson (pro hac vice #437444)
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100
jvogts@smbtrials.com
alothson@smbtrials.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed on April 22, 2016 to the following counsel:

Koskoff Koskoff & Bieder, PC
350 Fairfield Avenue
Bridgeport, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
khage@koskoff.com

Renzulli Law Firm LLP
81 Main Street
Suite 508
White Plains, NY 10601
crenzulli@renzullilaw.com
sallan@renzullilaw.com

Peter M. Berry, Esq.
Berry Law LLC
107 Old Windsor Road, 2nd Floor
Bloomfield, CT 06002
firm@berrylawllc.com

/s/ Scott M. Harrington/#307196
Scott M. Harrington

NO. FBT CV 15 6048103 S	**:**	**SUPERIOR COURT**
DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	**:**	**JUDICIAL DISTRICT OF FAIRFIELD**
V.	**:**	**AT BRIDGEPORT**
BUSHMASTER FIREARMS INTERNATIONAL, LLC, a/k/a, ET AL	**:**	**MAY 27, 2016**

PLAINTIFFS' OMNIBUS OBJECTION TO DEFENDANTS' MOTIONS TO STRIKE

TABLE OF CONTENTS

I. INTRODUCTION

Plaintiffs brought this action because defendants bear legal responsibility for the carnage at Sandy Hook Elementary School on December 14, 2012. Defendants chose to sell a military weapon to the civilian market, ignoring the unreasonable and demonstrated risk that its assaultive capabilities would be used against innocent civilians. In making that sale, defendants violated the common law of negligent entrustment and the Connecticut Unfair Trade Practices Act ("CUTPA"), two causes of action that Congress expressly preserved in the Protection of Lawful Commerce in Arms Act ("PLCAA").

Defendants attempt to shirk their legal responsibility by distorting the text of PLCAA to suit their purposes. Confronted with provisions of PLCAA that clearly authorize plaintiffs' causes of action, defendants resort to rewriting the statute to confer complete immunity from plaintiffs' claims. But their interpretations are contrary to PLCAA's plain meaning and find no support in case law. The Court should deny defendants' motions.[1]

II. LEGAL STANDARD

A motion to strike challenges a complaint on the grounds that it fails to state a claim for which relief can be granted. *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003). In deciding the motion, the court must "construe the complaint in the manner most favorable to sustaining its legal sufficiency." *Vacco v. Microsoft Corp.*, 260 Conn. 59, 65 (2002). Accordingly, "all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . [and] pleadings must be construed broadly and realistically,

[1] Plaintiffs file this Omnibus Objection in response to the motions and memoranda filed by all defendants, Docket Nos. 148-153. Because the Riverview Defendants largely adopted the other defendants' arguments, we cite only to the memoranda filed by the Remington and Camfour Defendants.

rather than narrowly and technically." *Gazo v. City of Stamford*, 255 Conn. 245, 260 (2001). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." *American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC*, 292 Conn. 111, 120 (2009).

The movant may not supplement the record by arguing or assuming facts not alleged in the challenged complaint. *Mercer v. Cosley*, 110 Conn. App. 283, 292 n.7 (2008) ("A speaking motion to strike is one improperly importing facts from outside the pleadings. Speaking motions have long been forbidden by our practice."); *Liljedahl Bros., Inc. v. Grigsby*, 215 Conn. 345, 348 (1990) ("Where the legal grounds for [a motion to strike] are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied.")

Nor can the movant use a motion to strike to obtain a more definite or detailed statement of facts, especially when no request to revise was filed. Prac. Bk. §§ 10-35, 10-38. "[T]he proper motion to challenge a failure to plead facts is a request to revise and not a motion to strike." *Salzano v. Goulet*, 2005 WL 2502701, at *1 (Conn. Super. Sept. 22, 2005) (Shluger, J.); *Poseidon Group, Inc. v. Bridgeport Hosp.*, 2004 WL 2591963, at *1 (Conn. Super. Oct. 6, 2004) (Levin, J.) ("[I]f the plaintiff desired a fuller factual statement of the defense, it should have filed a request to revise."); *see also Parsons v. United Technol. Corp*, 243 Conn. 66, 100 (1997) (Berdon, J., concurring and dissenting) ("The defendant, in order to protect itself from broad based allegations, need only file a request to revise . . . to compel the plaintiff to amend his pleading for 'a more complete or particular statement of the allegations.'").

Finally, under this "broad, flexible, and permissive" standard, the presence of mixed questions of law and fact cautions against dismissal. *Macomber v. Travelers Property & Cas.*

Corp, 261 Conn. 620, 629 (2002); *id.* at 636 ("questions of mixed fact and law…require[d] a more detailed factual matrix than [was] disclosed by the plaintiffs' allegations" and thus could not "be answered satisfactorily on [a] motion to strike"). This caution reflects Connecticut's long-standing rule that claims sounding in negligence, which are generally fact-intensive, should rarely be determined prior to trial. *E.g.*, *Spencer v. Good Earth Restaurant Corp.*, 164 Conn. 194, 199 (1972) ("Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner."); *Gutierrez v. Thorne,* 13 Conn. App. 493, 501 (1988) (reversing grant of summary judgment, despite uncontested facts, because the inference of foreseeability was property left to the jury); *Bendowski v. Quinnipiac College*, 1996 WL 219532, at **3-5 (Conn. Super. Apr. 8, 1996) (Silbert, J.) (denying motion to strike despite ambiguity surrounding the defendant's duty to plaintiff and the lack of any Connecticut case "that directly addresses the factual situation presented by this case" because "in negligence cases such as this, which are highly fact[-]dependent, the striking of complaints, like the granting of summary judgment, is disfavored").[2]

III. FACTUAL BACKGROUND

This action arises out of the shooting at Sandy Hook Elementary School on December 14, 2012 that killed twenty first-grade children and six educators and wounded two others. Plaintiffs are ten families whose lives were shattered that day: nine plaintiffs lost a child or spouse, and

[2] This same caution applies to CUTPA claims: "whether a defendant's acts constitute fraudulent misrepresentation, or deceptive or unfair trade practices under CUTPA, is a question of fact for the trier [of fact]." *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 505 (2000); *see also DiTomaso v. Shorehaven Golf Club, Inc.*, 2003 WL 21299609, at *3 (Conn. Super. May 23, 2003) (Lewis, J.) (denying motion to strike, despite factual brevity of allegations, on grounds that "it is not for this court to decide on a motion to strike whether the defendants' alleged acts were unfair or deceptive").

the tenth was shot multiple times but survived. *See* First Amended Complaint ("FAC") ¶¶ 37-46; *see also* ¶¶ 191-205.

Plaintiffs allege that the AR-15 rifle used in the shooting – a Bushmaster XM15-E2S – is not an ordinary weapon. The AR-15 was conceived out of the exigencies of modern conflict, as trench warfare gave way to close-range, highly mobile combat. *Id.* ¶¶ 48-50. After World War II, the U.S. Army's Operations Research Office analyzed more than three million casualty reports in their pursuit of the ideal combat weapon. *Id.* Their findings led the Army to develop specifications for a new service weapon: a lightweight rifle that would hold a large detachable magazine and rapidly expel ammunition with enough velocity to penetrate body armor and steel helmets. *Id.* ¶¶ 48-49. The AR-15 delivered; lightweight, air-cooled, gas-operated, and magazine-fed, the AR-15's capacity for rapid fire with limited recoil meant its lethality was not dependent on good aim or ideal combat conditions. *Id.* ¶ 50. Troops field-testing the weapon reported instantaneous deaths, as well as amputations, decapitations, and massive body wounds. *Id.* ¶ 51. The military ultimately adopted the AR-15 as its standard-issue service rifle, renaming it the M16. *Id.*

As an AR-15, the Bushmaster XM15-E2S is built for mass casualty assaults. Semiautomatic fire unleashes a torrent of bullets in a matter of seconds; large-capacity magazines allow for prolonged assaults; and powerful muzzle velocity makes each hit catastrophic. *Id.* ¶¶ 56-75. The combined effect of these mechanical features is more wounds, of greater severity, in more victims, in less time. *Id.* ¶¶ 72-73. This superior capacity for lethality – above and beyond other semiautomatic weapons – is why the AR-15 has endured as the U.S. military's weapon of choice for more than 50 years. *Id.* ¶ 74.

Indeed, the XM15-E2S's lethal efficiency is ideal for highly regulated institutions that require assaultive weaponry. When the AR-15 is sold to the military – and more recently, to law enforcement – it enters an environment where its devastating lethality is both justified and strictly controlled through protocols governing training, storage, safety, and the mental health of soldiers and officers. *Id.* ¶¶ 116-43. When defendants made the Bushmaster XM15-E2S available to the general public, however, they knowingly placed the same weapon into a very different environment: one where the weapon's utility for legitimate civilian purposes is scant, firearms are shared freely among family members, and oversight is virtually nonexistent, *id.* ¶¶ 144-66; where marketing extols the weapon for its "military-proven performance" that will make "forces of opposition bow down," *id.* ¶¶ 75-92; and where a litany of mass shootings have made two things harrowingly clear – the AR-15 is the weapon of choice for shooters looking to inflict maximum casualties, and American schools are on the frontlines of such violence, *id.* ¶¶ 167-170.

Defendants nevertheless sold the Bushmaster XM15-E2S as a civilian weapon, with negligent disregard for the obvious and unreasonable risks associated with that sale. The Remington Defendants sold the XM15-E2S to the Camfour Defendants, who in turn sold it to the Riverview Defendants; the purpose of both transactions was the re-sale of the weapon to the civilian market. *See id.* ¶¶ 176-78; *id.* Count I ¶ 223; *id.* Count II ¶ 223. In March of 2010, the Riverview Defendants sold the Bushmaster XM15-E2S to Nancy Lanza. *Id.* ¶ 182.

Plaintiffs allege that Nancy Lanza purchased the Bushmaster XM15-E2S to give to or share with her son, Adam Lanza – a devoted player of first-person shooter games who was captivated by the military. *Id.* ¶¶183-85. When Adam turned eighteen on April 22, 2010, he did

not enlist; instead, he gained unfettered access to the military-style assault rifle his mother had purchased twelve days before. *Id.* ¶ 186.

On the morning of December 14, 2012, Adam Lanza selected the weaponry he would use in his assault on Sandy Hook Elementary School. Available options included, in addition to the Bushmaster XM15-E2S, at least one shotgun, two bolt-action rifles (one of which he used to kill his mother), three handguns (one of which he used to kill himself), and three samurai swords. *Id.* ¶ 188. From this extensive arsenal, Adam Lanza selected the Bushmaster XM15-E2S. His choice was anything but random; plaintiffs allege that Adam Lanza chose the Bushmaster XM15-E2S for its assaultive qualities, in particular its efficiency in inflicting mass casualties, as well as for its marketed association with military combat. *Id.* ¶¶ 189-90.

Just after 9:30 a.m., Adam Lanza shot his way into Sandy Hook Elementary School, armed with the Bushmaster XM15-E2S and ten 30-round magazines – several of which he had taped together to allow for faster reload. *Id.* ¶ 187. It was the weapon he would use to take 26 lives in under five minutes. Mary Sherlach, a child psychologist, was in a meeting with the school's principal when the first shots were fired; when they went to investigate, both were killed with the Bushmaster XM15-E2S. *Id.* ¶ 202. Lead teacher Natalie Hammond and another staff member were shot with the Bushmaster XM15-E2S and wounded. *Id.*

Adam Lanza then approached two first-grade classrooms, Classroom 8 and Classroom 10. In Classroom 8, Adam Lanza used the Bushmaster XM15-E2S to kill 15 children and 2 adults, including seven-year-old Daniel Barden, six-year-olds Benjamin Wheeler and Noah Pozner, 29-year-old behavioral therapist Rachel D'Avino, and 30-year-old substitute teacher Lauren Rousseau. *Id.* ¶ 204. In Classroom 10, Adam Lanza used the Bushmaster XM15-E2S to kill 5 children and 2 adults, including Dylan Hockley and Jesse Lewis, both six years old, and

their 27-year-old teacher Victoria Soto. *Id.* ¶ 205. Nine children from Classroom 10 were able to escape when Adam Lanza paused to reload the Bushmaster XM15-E2S with another 30-round magazine. *Id.* ¶ 206.

The first 9-1-1 call from Sandy Hook Elementary School was made at 9:35 a.m.; by 9:40 a.m., the assault was complete. *Id.* ¶ 207. In the span of those five minutes, 154 bullets were expelled from the Bushmaster XM15-E2S. *Id.* ¶ 212.

Based on these and additional allegations, plaintiffs assert claims of negligent entrustment and violation of CUTPA against the entities that marketed and sold the Bushmaster XM15-E2S rifle used in the shooting: the Remington Defendants, the Camfour Defendants, and the Riverview Defendants. On October 29, 2015, plaintiffs filed their First Amended Complaint, which is the operative complaint for purposes of the defendants' motions.

IV. PLAINTIFFS STATE NEGLIGENT ENTRUSTMENT CLAIMS

In Connecticut, entrusting a dangerous instrument to another gives rise to a duty to guard against the use of that instrument to cause harm – even if the harm results from a criminal act. Simple as that concept it, it is deeply fact-intensive; it implicates, among other things, the dangerousness of the item being entrusted; the propensities of certain classes of persons; and inferences about how people are likely to behave under certain sets of circumstances. The extent of an entrustor's knowledge, and the resulting scope of foreseeable harm, are questions that belong to a jury.

Defendants implicitly acknowledge this by largely ignoring the common law of negligent entrustment. In an effort to transform factual issues into legal ones, they assert that PLCAA forecloses plaintiffs' claims entirely. In doing so, they ignore the statute's plain meaning and

advance untenably narrow interpretations of the words "use" and "seller." These arguments must be rejected.

A. Plaintiffs State Negligent Entrustment Claims under Connecticut Common Law

Under Connecticut law, those who entrust a dangerous instrument to another must do so prudently. This duty is defined by Section 390 of the Restatement (Second) of Torts, which imposes liability on one who "supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely . . . to use it in a manner involving unreasonable risk of physical harm to himself and others." Restatement (Second) of Torts § 390 (1965). The Connecticut Supreme Court adopted Section 390's definition of negligent entrustment in 1933. *See Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678 (1933) (reciting elements of § 390); *Short v. Ross*, 2013 WL 1111820, at *5 (Conn. Super. Feb. 26, 2013) (Wilson, J.) ("[A]s long recognized by the decisions of the Superior Court, *Greeley* 'virtually adopted' the approach provided by the Restatement.").

The doctrine of negligent entrustment takes the world as it is, not as it should be. It assigns liability "based upon the rule . . . that the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so." Rest. (Second) § 390 cmt. b. A defendant's knowledge about how "human beings will conduct themselves" – which determines the scope of foreseeable harm – is thus at the crux of any negligent entrustment claim and ultimately a question for the trier of fact.

Connecticut case law recognizes that unreasonable harm posed by an entrustee's use of a chattel may become foreseeable to the entrustor in at least three distinct ways. First, the entrustee's prior behavior may evidence a personal propensity to misuse the chattel. For

example, where an owner entrusts her car to another, the victim of a subsequent collision may claim that the entrustment was negligent because the owner knew, or should have known, that the entrustee's past behavior created a heightened risk of unsafe driving. *E.g.*, *Morin v. Keddy*, 1993 WL 451449 (Conn. Super. Oct. 25, 1993) (denying motion to strike where plaintiff alleged designated driver entrusted car to intoxicated friend).[3]

Second, the entrustee may belong to a class whose members generally share a propensity to misuse the chattel. The comments that accompany Section 390 explain this principle: one who supplies a chattel "is not entitled to assume that the other will use it safely if the supplier knows or has reason to know that such other is likely to use it dangerously, *as where the other belongs to a class which is notoriously incompetent to use the chattel safely*[.]" Rest. (Second) § 390 cmt. B (emphasis supplied). Thus, in *Burbee v. McFarland*, 114 Conn. 56, 157 A. 538 (1931), the Connecticut Supreme Court found a negligent entrustment claim legally viable based solely on the fact that the defendant store had sold fireworks to a twelve-year-old boy, who was injured while setting one off. The Court explained that it was "the business of the dealer to refuse to sell [the child] articles likely to put in jeopardy his own or some other person's life," and it concluded that the dealer may have violated that duty because children as a class, "by reason of youth and inexperience, … might innocently and ignorantly play with or use [the fireworks] to his injury." 157 A. at 539. Crucially, the Court was not persuaded by the defendant's argument that the particular child at issue was "old enough and sufficiently developed mentally to read and properly understand the instructions printed on the box." *Id.*

[3] The types of cases cited by the Camfour Defendants, *see* Camfour Mem. at 18-19, fall into this category.

Those considerations, although potentially relevant, "involved questions of fact which were properly left to the jury." *Id.*[4]

Third, the entrustee may plan to use the chattel in a particular environment that, for a variety of reasons, augments the risk of harm associated with the chattel. In this scenario, unreasonable risks may be foreseeable even if the entrustee's personal propensities would otherwise not raise concerns about her use of the chattel, and even if the same use would be reasonable in a different context.

Short v. Ross, 2013 WL 1111820 (Conn. Super. Ct. Feb. 26, 2013) (Wilson, J.), illustrates the relevance of such environmental considerations to a negligent entrustment claim. The plaintiff there had, while attending a tailgate, been hit by a vehicle rented from U-Haul. The plaintiff alleged that U-Haul had negligently entrusted the vehicle to its driver – not because the driver was unlicensed, drunk, or had a history of unsafe driving – but because U-Haul knew, or should have known, that the driver planned to use the vehicle at a tailgate. The court deemed those allegations sufficient to state a negligent entrustment claim, emphasizing the dangers attendant to a tailgate environment – including the tendencies of people *other than the entrustee*:

> In the court's estimation, the facts pleaded in the complaint, when fairly read, allege that U-Haul knew or ought reasonably to have known that [the driver] proposed to utilize the truck in an environment where the danger and risk of injury was considerably higher than that typically attendant to the use of a vehicle on the open road. This is because the proposed environment was

[4] Though children are the most obvious example of a class of persons who are unfit to handle dangerous instruments, the logic of the Restatement is not so confined. The commentary to Section 390 speaks to the entrustor's knowledge of the characteristics of the class; it does not impose restrictions on how a class may be defined. *See Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 328 Ill. App. 3d 482, 488 (2002) ("The plaintiff need not prove that the defendant knew of specific individual propensities for harm; a lawsuit may succeed with proof that the defendant entrusted the dangerous article to a member of a larger class, where the defendant knew or should have known that members of the larger class generally tended to use such articles in a manner involving unreasonable risk of harm.").

> pedestrian-dense, unregulated by the rules of the road and would contain a large number of individuals who had recently consumed alcohol and who would therefore be less capable of exercising their faculties to avoid moving vehicles, and might, in fact, stumble in front of moving vehicles.

Id. at *8. Because of those environmental dangers, U-Haul arguably should have known "that there [was] cause why [the vehicle] ought not to be entrusted to another," *id.* at *7 – even if the renter's driving would have been reasonably safe in a different context.[5]

The absence of safety regulations in a particular environment may also give rise to a foreseeable risk of harm from a chattel's use. Thus, *Short* focused not only on the risks created by the propensities of other tailgaters, but also on the absence of regulations that might meaningfully curb those risks. At a tailgate, the court noted, moving vehicles and pedestrians are "unregulated by the rules of the road." *Id.* at *8.

Short's emphasis on the dearth of safety regulations aligns with how other courts have analyzed claims under Restatement 390. For example, in *Fredericks v. Gen. Motors Corp.*, 48 Mich. App. 580 (1973), the Michigan Court of Appeals concluded that a negligent entrustment claim against General Motors should have survived summary judgment, and therefore remanded for a trial. The claim was premised on General Motors' entrustment of manufacturing dies to a company that allegedly permitted its employees to use the dies "in an unsafe machine hazardous to the operators thereof," without requiring use of "proper and adequate guards and safety devices." *Id.* at 583, 587. In other words, the dies were to be used in a particular environment – the company's workspace – that posed unique and potentially foreseeable dangers because of the

[5] The court clarified that it was not imposing a duty to investigate prospective renters (which Connecticut case law has rejected); rather, under the theory of negligent entrustment liability, U-Haul was subject only to "that general duty imposed by law upon all actors to avoid harm to foreseeable victims." *Id.* at *10.

entrustee's failure to implement appropriate safety regulations. The court remanded so that a jury could decide whether those facts rendered General Motors' entrustment negligent.

And in *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972), the Eighth Circuit affirmed a verdict against a cement manufacturer for negligently entrusting cherry bombs to its employees. The bombs were intended to be used for job-related demolitions at the cement plant, but one of the employees instead gave some of them to a group of children, one of whom was injured. In affirming the verdict, the court concluded that the manufacturer should have foreseen the unreasonable risk that the bombs would be removed from the plant and detonated hazardously. The court premised that conclusion, in part, on the absence of meaningful safety regulations in the plant's environment: It stressed that "[n]o records were kept ... of the bombs issued and no precautions were taken to insure that all of the bombs were used for business purposes or returned to the foreman for safekeeping," leading to "lax control" over "the return of unused bombs." *Id.* at 513-14.

As the foregoing discussion demonstrates, the foreseeability of unreasonable risk in the context of negligent entrustment is a complex and fact-intensive issue. Various related considerations – including the individual propensities of the entrustee, the general propensities of the entrustee's class, the propensities of others in the environment where the entrustee will use the chattel, and the absence of safety regulations in that environment – may be relevant, depending on the nature of the plaintiff's factual allegations. The common law of negligent entrustment thus epitomizes the principle that "'the trier of fact is, in this state, given a wide latitude in drawing the inference of negligence.'" *Kalina v. Kmart Corp.*, 1993 WL 307630, at *5 (Conn. Super. Aug. 5, 1993) (Lager, J.) (quoting *Borsoi v. Sparico*, 141 Conn. 366, 369 (1954)). Consequently, courts are traditionally hesitant to decide issues surrounding knowledge

and foreseeability as a matter of law. *See id.* at *4 (denying defendant K-Mart's motion for summary judgment on negligent entrustment of a firearm claim – even though its sales clerk asked for identification, required purchaser to fill out paperwork required by law, and testified that, in her opinion, the purchaser showed no signs of disability – because "under a theory of negligent entrustment . . . factual questions exist[ed] about what K-Mart knew or should have known that should be resolved by a jury").

Applying that common law here, plaintiffs state a claim for negligent entrustment. The factual allegations in the amended complaint, taken as true, demonstrate that defendants foresaw, or should have foreseen, that their entrustment of the Bushmaster XM15-E2S created an unreasonable risk of harm.

To begin with, as in *Burbee*, there is reason to believe that the chattel is too dangerous to be sold to a particular class of persons: here, that class is defined as non- military and law enforcement because the AR-15 is an assault rifle designed for military combatants and initially sold only to them. *See* FAC ¶¶ 47-74 (Bushmaster XM15-E2S designed for the military and uniquely suited for mass casualty assaults); *compare id.* at ¶¶ 116-43, *with* ¶¶ 144-66 (military and law enforcement's extensive protocols governing safety, storage, and training are not present outside those institutions); *id.* at ¶¶ 105-115 (ATF banned import of weapons like the XM15-E2S because its design serves a function "in combat and crime" but not hunting or sporting); *id.* at ¶¶ 94-104 (XM15-E2S is unnecessary, and may be dangerous, for home defense).

Moreover, plaintiffs have alleged – with great specificity – that the civilian environment into which the Bushmaster XM15-E2S was sold was such that defendants should have appreciated the unreasonable risk of harm to innocent lives created by the sale. This includes defendants' knowledge about how people "conduct themselves" around firearms generally, *see*

id. at ¶ 153-55 (gun owners routinely fail to secure their weapons); awareness that oversight is grossly insufficient, *id.* at ¶¶ 159-64 (ATF's regulation of gun dealers is inadequate), *id.* at ¶¶ 156-58 (transfer of guns among family members is entirely unregulated), *compare id.* at ¶¶ 117, 137, 138, 143 *with* ¶¶ 151 (military and law enforcement assess mental health of users of AR-15s and are empowered to deny access; no such oversight is present among civilians); and knowledge that a particular type of tragedy is associated with civilian use of the AR-15, *see id.* at ¶ 165 (several highly-publicized mass shootings have demonstrated that perpetrators are able to easily acquire AR-15s and that such weapons are the weapon of choice for those looking to inflict maximum casualties), *id.* at ¶¶ 168-70 (prior to Sandy Hook, AR-15s had been used in mass shootings to kill elementary school children, high school children, and college students).

Finally, plaintiffs allege facts that add a troubling dimension to the question of whether a horrific event like the shooting at Sandy Hook Elementary School was foreseeable to the defendants. That is, plaintiffs allege that the Bushmaster XM15-E2S was explicitly marketed as a weapon of war. *See id.* ¶¶ 76-84 (advertising lauds weapon with such phrases as "mission-adaptable," "military-proven performance," "ultimate combat weapons system" and "forces of opposition, bow down – you are single-handedly outnumbered"), ¶¶ 85-86 (weapon is featured in highly realistic and violent first-person shooter games that glorify killing and teach assaultive weapon techniques), ¶¶ 87-92 (XM15-E2S comes with "standard" 30 round magazine, while hunting and competition rifles come with 5 or 10 round magazines).

These allegations give rise to common law claims for negligent entrustment.[6] Defendants clearly disagree; but they also know that Connecticut law provides no basis for converting those

[6] To some extent, defendants suggest that aspects of plaintiffs' claim – including its reference to a class as broad as civilians – depart from common law principles. As demonstrated above, however, plaintiffs' claim is faithful to those principles. The only unprecedented feature of this

factual questions into legal ones. Their solution to this problem is to insist, contrary to every relevant source of law, that PLCAA compels this Court to dismiss plaintiffs' negligent entrustment claims as a matter of law. In fact, PLCAA does the exact opposite: it preserves plaintiffs' right to bring common negligent entrustment claims.

B. PLCAA Preserves Common Law Negligent Entrustment Claims

PLCAA does not sweep nearly as broadly as defendants suggest. The statute defines its primary purpose as follows: "To prohibit causes of action against" firearm manufacturers and sellers "for the harm solely caused by the criminal or unlawful misuse of [a] firearm . . . when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (purposes section). As the word "solely" in that statement reflects, PLCAA is a balancing statute; it both limits the exposure of gun companies and preserves the rights of injured parties to seek redress under specified causes of action when those companies share responsibility for a particular harm.

The operative provisions of PLCAA effectuate that balance by preempting a broad category of lawsuits arising from the criminal misuse of firearms, while preserving claims that target wrongdoing in the manufacturing and sale of firearms. Specifically, PLCAA preserves six causes of action, including "an action brought against a seller for negligent entrustment." 15 U.S.C. § 7903(5)(A)(ii). It is important to note that PLCAA does not create a cause of action for negligent entrustment; it simply preserves it. *See* 15 U.S.C. § 7903(5)(C) ("[N]o provision of this chapter shall be construed to create a public or private cause of action or remedy."); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 n.6 (9th Cir. 2009) ("While Congress chose generally to

---

lawsuit is the nature and magnitude of defendants' negligent entrustments. They chose to sell a highly lethal military weapon to the public without taking any meaningful precautions. Plaintiffs' claim appropriately applies the common law of negligent entrustment – including its definitions of the relevant class and environment – to the defendants' misconduct.

preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se).").

PLCAA preserves common law negligent entrustment, in particular, by codifying the essential elements of Section 390 of the Restatement. Under that section, liability arises when one "supplies" a chattel "for the use of another whom the supplier knows or has reason to know to be likely . . . . to use it in a manner involving unreasonable risk of physical harm to himself and others." Rest. (Second) § 390. PLCAA mirrors that framework within its text: negligent entrustment means "supplying" a firearm "for use by another person when the seller knows, or reasonably should know, the person to whom the [firearm] is supplied is likely to, and does, use the [firearm] in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B).

By borrowing the Restatement's formulation of negligent entrustment, Congress created a framework that both reflects and accommodates state common law. The Restatement is "the most widely accepted distillation of the common law of torts." *Field v. Mans*, 516 U.S. 59, 70 (1995). Moreover, Section 390 is the authoritative source of negligent entrustment law in nearly every state that recognizes the cause of action – including Connecticut. *See W. v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005) ("In line with a majority of other states, this Court has previously cited section 390 with approval in defining negligent entrustment."); *Casebolt v. Cowan*, 829 P.2d 352, 358-59 (Colo. 1992) (collecting cases where states have "employed, approved, or adopted" Section 390); *Short*, 2013 WL 1111820, at *5 (recognizing that the Connecticut Supreme Court adopted the Restatement approach in *Greeley*). The logic of

that choice, of course, flows naturally from Congress' decision not to create causes of action through PLCAA, but merely to preserve certain existing claims.[7]

Thus, PLCAA permits actions that satisfy the common law elements of negligent entrustment to proceed against any defendant that acts as a "seller," as that term is defined in PLCAA. *See* 15 U.S.C. § 7903(5)(A)(ii); *id.* § 7903(6)(B). All three defendants argue that plaintiffs have failed to state a negligent entrustment claim that PLCAA permits. They contend that a firearm can only be "use[d] in a manner involving an unreasonable risk of physical injury" when used to directly cause injury; thus, under this interpretation, neither Camfour, Riverview nor Nancy Lanza "used" the Bushmaster XM15-E2S. The Remington Defendants additionally argue that they are not "sellers" as PLCAA uses the term.

In evaluating these arguments, the Court's analysis must be guided by the plain meaning of PLCAA. "With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule for the interpretation of federal statutes because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit." *Dark-Eyes v. Comm'r of Revenue Servs.*, 276 Conn. 559, 571 (2006). That rule dictates: "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Caputo v.*

---

[7] Indeed, state courts frame their understanding of PLCAA's negligent entrustment definition around its similarity to the Restatement and their own state law. *See, e.g.*, *Gilland*, 2011 WL 2479693, at *12 (noting that "[the PLCAA] definition is consistent with Connecticut law on negligent entrustment," which is governed by § 390 of the Restatement); *Estate of Kim v. Coxe*, 295 P.3d 380, 394 & n.89 (Alaska 2013) ("The PLCAA definition is substantially the same as the Restatement version Alaska follows. [Citing § 390 in footnote]"); *see also Al-Salihi v. Gander Mountain, Inc.*, 2013 WL 5310214, at *12 (N.D.N.Y. Sept. 20, 2013) ("The PLCAA standard mirrors the standard for the tort of negligent entrustment under New York law[.][Citing § 390]").

Pfizer, Inc., 267 F.3d 181, 189 (2d Cir. 2001) (quotation marks and citation omitted); *see also Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004) ("Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there."); *cf. Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). [8]

A plain reading of the statute compels the conclusion that plaintiffs' negligent entrustment allegations are not barred and must be permitted to proceed under Connecticut law.

C. Defendants are "Sellers" under PLCAA

The Camfour and Riverview Defendants acknowledge that they are "sellers" under PLCAA and thus subject to negligent entrustment liability. The Remington Defendants dispute this point, despite the fact that plaintiffs clearly allege it. In doing so, they implicitly ask the Court to disregard its duty to "take the facts to be those alleged in the complaint" and "construe

---

[8] Defendants seem to prefer a canon of their own fashioning – that Congress meant what it said when it wrote the purpose section of PLCAA and did not mean what it said when it delineated the scope of permitted causes of action. Throughout their briefs, defendants imply that the underlying policy goals of PLCAA are evidence that plaintiffs' negligent entrustment claims must be dismissed. *See, e.g.*, Remington Mem. at 6 (arguing that "[t]he declared purpose of Congress" set out in the purposes section demonstrates that "PLCAA was enacted to protect firearm manufacturers against the very claims Plaintiffs make in this case"). This is thoroughly circular logic. It is nonsensical to suggest that Congress' intent to bar a certain category of lawsuits is also evidence of its intent to preclude a lawsuit that is *explicitly exempted* from that category. *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original).

the complaint in the manner most favorable to sustaining its legal sufficiency." *Vacco*, 260 Conn. at 65. The Court need not – and should not – look beyond plaintiffs' allegations. But even if it does, the Remington Defendants' arguments are meritless; they require the Court to read a limitation into PLCAA's text that does not exist, to enforce a strained reading of "seller" that defies common sense, and to rely on a contradictory legislative history that offers no guidance as to legislative intent.

1. Plaintiffs Have Alleged that the Remington Defendants Are Sellers

A "seller" is defined in PLCAA as, among other things, "a dealer . . . who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer[.]" 15 U.S.C. § 7903(6)(B). PLCAA adopts the Gun Control Act's definition of a "dealer," which is "any person engaged in the business of selling firearms at wholesale or retail." 18 U.S.C. § 921(a)(11). PLCAA also incorporates the Gun Control Act's definition of someone "engaged in the business," which reads:

> a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

18 U.S.C. § 921(a)(21). In other words, a "seller" under PLCAA includes an entity that acts like a dealer – by selling firearms at wholesale or retail as a regular course of business – and is licensed as a dealer under federal law.

Plaintiffs' Complaint makes numerous allegation pertaining to the Remington Defendants' sales activities. *E.g.*, FAC ¶ 97 (at all relevant times, Remington Arms Company, LLC manufactured and sold AR-15s); *id.* at ¶ 171(Remington Defendants sell to wholesalers and

dealers); *id.* at ¶ 171 (Remington Defendants sell directly to prominent chain retail stores); *id.* at ¶ 176 (Remington Defendants sold the Bushmaster XM15-E2S to the Camfour Defendants).

The Remington Defendants ignore these well-pled facts, arguing not only that plaintiffs were required to allege that they were "engaged in the business" under the definition provided by federal law, but that they were "'engaged in the business' as a dealer *with respect to the firearm that was sold and shipped*." Remington Mem. at 10 (emphasis supplied). As an initial matter, it is lost on plaintiffs how they could allege – much less prove – that Remington was "engaged in the business" of selling the Bushmaster XM15-E2S specifically. By definition, one cannot "devote[] time, attention, and labor to dealing in firearms as a regular course of trade or business" in the course of a single sale. More to the point, this level of specificity is simply not required. It is axiomatic that "[w]hat is necessarily implied [in an allegation] need not be expressly alleged." *Lombard v. Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 626 (2000). It can certainly be inferred from plaintiffs' complaint, reading it "broadly and realistically rather than narrowly and technically," that plaintiffs have alleged that Remington is a "seller" as that term is defined in PLCAA. *Gazo*, 255 Conn. at 260.

Moreover, if the Remington Defendants desired greater specificity in plaintiffs' allegations, they should have followed the proper pleading order dictated by the Practice Book and filed a Request to Revise. *See* Prac. Bk. § 10-35; *Salzano*, 2005 WL 2502701, at *1 ("[T]he proper motion to challenge a failure to plead facts is a request to revise and not a motion to strike."). Having failed to do so, they may not now complain that plaintiffs' factual allegations are insufficient.

The Court should reject the Remington Defendants' argument as to whether they are a seller on this basis alone. Plaintiffs nevertheless respond to each of their arguments below.

2. "Seller" and "Manufacturer" Are Not Mutually Exclusive Terms

Remington counters that it cannot qualify as a seller under PLCAA because it is a manufacturer, and the statutory terms "seller" and "manufacturer" must be construed as mutually exclusive. The statute contains no express language to that effect. Remington therefore argues that its interpretation finds implicit support in a feature of PLCAA's structure – the fact that certain exceptions to the bar on qualified civil liability actions apply to both sellers and manufacturers, while the negligent entrustment exception applies only to sellers. *See* Remington Mem. at 10-11; *e.g.*, 15 U.S.C. § 7903(5)(A)(iii) ("an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product").

This interpretation is utterly unpersuasive. The statute defines "seller" and "manufacturer" by reference to types of conduct and federal licenses that are distinct, but not contradictory.[9] By distinguishing between the two terms, the statute suggests that an entity might be one but not the other; and by permitting negligent entrustment actions only against sellers, it makes clear that such an action must be predicated on a firearm sale, and that only professional firearm sellers are within the statute's scope. *See* 18 U.S.C. § 921(a)(21) (a dealer is "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business . . . [but] shall not include a person who makes occasional sales . . . .").

[9] A seller is someone engaged in the business of selling firearms at wholesale or retail who is licensed as a dealer. *See* 15 U.S.C. § 7903(6)(B); 18 U.S.C. § 921(a)(11). A manufacturer is someone engaged in the business of manufacturing firearms who is licensed as a manufacturer. *See* 15 U.S.C. § 7903(2).

Nothing in PLCAA's language suggests, however, that a single entity cannot be both a seller and a manufacturer.

Indeed, when Congress wishes to preclude overlap between those two categories, it does so explicitly. For example, the National Firearms Act – which PLCAA cites, *see* 15 U.S.C. § 7901(a)(4) – defines a "dealer" as "any person, *not a manufacturer* or importer, engaged in the business of selling, renting, leasing, or loaning firearms[.]" 26 U.S.C. § 5845(k) (emphasis supplied). The absence of any remotely comparable language in PLCAA buttresses the conclusion that the statute does not render sellers and manufacturers mutually exclusive. *See also Broughman v. Carver*, 624 F.3d 670 (4th Cir. 2010) (holding that the terms "dealer" and "manufacturer" in the Gun Control Act of 1968, whose definitions closely mirror those of "seller" and "manufacturer" in PLCAA, are not mutually exclusive).[10]

To embrace the Remington Defendants' interpretation is to accept that Congress intended to draw "untenable distinctions" between entities that sell firearms. *Dark-Eyes*, 276 Conn. at 571. If Congress had defined "seller" to apply only to individuals or entities that sell directly to consumers – such as the Riverview Defendants – Remington's argument that manufacturers are immune from negligent entrustment liability would be more compelling. But Congress did not do that; it gave "seller" a much broader scope, linking it to the Gun Control Act's formulation of "any person engaged in the business of selling firearms at *wholesale* or retail." 18 U.S.C. § 921(a)(11) (emphasis supplied); 15 U.S.C. § 7903(6)(B). In other words, distributors like the

[10] The Remington Defendants' disregard for PLCAA's plain meaning is hard to reconcile with their insistence that the Separation of Powers be respected. *See* Remington Mem. at 5-6. Indeed, "'preference for plain meaning is *based on* the constitutional separation of powers – Congress makes the law and the judiciary interprets it.'" *Mutts v. S. CT State Univ.*, 2006 WL 1806179, at *10 (D. Conn. June 28, 2006) *aff'd* 242 F. App'x 725 (2d Cir. 2007) (quoting *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002)) (emphasis supplied).

Camfour Defendants (who have acknowledged they are sellers under PLCAA) can be liable under a negligent entrustment cause of action for selling firearms in bulk to other dealers. This is precisely what the Remington Defendants do: they sells firearms generally – and AR-15s in particular – to dealers like Camfour, as well as directly to retail stores like Wal-Mart and Dick's Sporting Goods. FAC ¶¶ 171, 172. It is absurd to suggest that the Camfour Defendants can be liable for that conduct but the Remington Defendants cannot, simply because a separate part of Remington's business involves the manufacture of firearms.[11]

3. Remington's Argument That They Are Not "Engaged In The Business" Of Selling Firearms Is Improper

The Remington Defendants claim that they are not "engaged in the business" of selling firearms as that phrase is defined by federal law because they do not engage in the "repetitive purchase and resale of firearms." *See* 18 U.S.C. § 921(a)(21). This argument "speaks," relying on facts not alleged. *See* Remington Mem. at 11 ("When Remington sold the firearm it had manufactured to Camfour, it did not engage in the purchase and resale of the firearm."); *id.* at 10 n.3 ("A licensed manufacturer sells the firearms it manufactures from its premises under its manufacturer license."). "[I]mproperly importing facts from outside the pleadings" is referred to as a "speaking motion to strike" and has "long been forbidden by our practice." *Mercer*, 110 Conn. App. at 292 n.7; *see also Liljedahl Bros.*, 215 Conn. at 348 (where motion to strike is

[11] By the same token, under the Remington Defendants' interpretation, an entity that sells guns can immunize itself from negligent entrustment liability as soon as it makes an additional foray into manufacturing. Suppose that tomorrow the Camfour Defendants begin buying firearm parts and assembling them into custom rifles for sale. Suppose they then obtain a federal manufacturing license to ensure this side business is legally compliant. If the Remington Defendants' reading of PLCAA were correct, such conduct would act as a total shield from liability for negligent sales. This outcome cannot be squared with the directive that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *Dark-Eyes*, 276 Conn. at 571.

"dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied.").

In any event, the Remington Defendants fail to mention that courts – including the Second Circuit – have rejected the notion that each element of Section 921(a)(21)(C) must be established to find that a dealer is "engaged in the business." *See United States v. Allah*, 130 F.3d 33, 43 (2d Cir. 1997) (affirming jury charge that defined a firearm dealer "engaged in the business" as a person who "devotes time, attention, or labor to dealing in firearms as a regular course of trade or business for the purpose of a livelihood or profit" and specifically rejecting defendant's argument that the charge was defective because it did not use the exact language of § 921(a)(21)(C)); *United States v. Shan*, 80 F. App'x 31, 31-32 (9th Cir. 2003) ("[Defendant]'s argument rests upon the absence of evidence showing that he profited through the 'repetitive purchase and resale of firearms.' Nevertheless, this Court has previously held that if a person has guns on hand or is ready and able to procure them, that person is engaged in the business of dealing in firearms." (quotation marks and citation omitted)). Under that approach, the Remington Defendants may be "engaged in the business" under Section 921(a)(21)(C) *regardless* of the outcome of discovery on "repetitive purchase and resale."

4. The Court Should Not Consider PLCAA's Legislative History

The Remington Defendants' reliance on legislative history to interpret the meaning of "seller" is inappropriate. *See* Remington Mem. at 12-13. PLCAA's legislative history is notoriously unreliable,[12] and the self-serving excerpts quoted by the Remington Defendants are

[12] PLCAA's legislative history is replete with conflicting statements by members of Congress, which can be selectively cited to support nearly any point. *See, e.g.*, *Estate of Kim*, 295 P.3d at 387 ("The Estate points out portions of the PLCAA's legislative history supporting its interpretation [that PLCAA does not bar general negligence actions]. Senator Craig, the

not a fair or accurate guide to construing these subsections. Indeed, Senator Craig, whose statement the Remington Defendants rely on to "resolve[] any ambiguity" in the meaning of seller, is a perfect example of such unreliability. In the course of debating the passage of PLCAA, the Senator also said the opposite of what Remington would like this Court to believe:

> We have also tried to make the narrow scope of the bill clear by listing specific kinds of lawsuits that are *not* prohibited. Section 4 says they include: actions for harm resulting from defects in the firearm itself when used as intended—that is product liability suits—*actions based on the negligence or negligent entrustment by the gun manufacturer*, seller, or trade association; actions for breach of contract by those parties.

150 Cong Rec S1861 (Sen. Craig) (emphasis supplied) (cited portions of the Congressional record are attached as Exhibit A).[13] Other Congressional co-sponsors of PLCAA expressed similar views. *E.g.*, 151 Cong Rec S9063 (Sen. Coburn) ("Firearms and ammunition manufacturers or sellers may be held liable for negligent entrustment or negligence per se[.]").

PLCAA's sponsor, stated: 'If manufacturers or dealers break the law or commit negligence, they are still liable.' [Defendant] points out portions of the legislative history supporting his position. For example, Senator Reed stated: 'This bill goes way beyond strict liability. It says simple negligence is out the door.' .... The PLCAA's legislative history is not 'somewhat contrary' [to the plain meaning]; it is indeterminate, and it does not control the statute's interpretation.").

[13] The Remington Defendants argue that this quote is "misleading" because it cites from a debate on PLCAA during the previous session when the bill was not passed. *See* Remington Mem. at 12 n.4. For purposes of plaintiffs' point, the timing of the statement is unimportant. The definition of negligent entrustment under consideration, as recited by Senator Reed immediately after Senator Craig's comments, was effectively identical to the one codified in PLCAA: "Negligent entrustment is a defined term in the legislation. It means: . . . the supplying of a qualified product *by a seller* for use by another person when *the seller* knows, or should know, the person to whom the product is supplied to is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." Ex. A, 150 Cong Rec S1863 (Sen. Reed) (emphasis supplied); *see also* 151 Cong Rec S9087-88 (Sen. Craig) ("[I]f this bill and this debate seem familiar to any of us, it should, because the Senate debated a very similar measure a little over a year ago.").

PLCAA's legislative history offers no guidance on the question of whether Remington is a seller – or on any other question pertinent to the pending motions – and it should play no role in the Court's analysis.

D. Defendants' Restrictive Interpretation of Negligent Entrustment Is Wrong

Defendants challenge plaintiffs' negligent entrustment claim by arguing that "using" a firearm in a "manner involving unreasonable risk of physical injury" can only mean using to inflict injury. Thus, they conclude that a negligent entrustment action can only survive PLCAA if the defendant supplied the firearm directly to the person who caused harm – here, Adam Lanza. They categorically reject the notion that selling a weapon can constitute a "use." *E.g.*, Remington Mem. at 13; Camfour Mem. at 17.

The problem with this argument is that there is no support for it. It contravenes the plain meaning of the word "use" as well as the broader statutory context, and ignores the common law roots attached to the word.

1. The Plain Meaning of "Use" is Broad

In arguing that "use" of a firearm can only mean "using to cause harm," the defendants disregard both the plain meaning rule and United States Supreme Court precedent. In *Smith v. United States*, 508 U.S. 223 (1993) – decided more than a decade before PLCAA was enacted – the Supreme Court held that "using" a firearm encompasses more than using it for its "intended purpose" (that is, as a weapon) and further, that one may "use" a firearm by bartering it. *Id.* at 230. In *Smith*, the Court was called upon to discern "the everyday meaning" of the word "use" after a criminal defendant challenged a penalty enhancement on the grounds that trading a firearm in exchange for drugs did not constitute a "use" of the firearm under the statute. *Id.* at

228. After consulting multiple dictionaries and reviewing past interpretations of the term, the Court concluded that the ordinary meaning of "use" is expansive:

> Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "'to employ'" or "'to derive service from.'" Petitioner's handling of the MAC-10 in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.

Smith, 508 U.S. at 228-29 (citations omitted); *see also United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) ("The overwhelming majority of authority on the plain meaning of 'use' contemplates the application of something to achieve a purpose."). Notably, *Smith* rejected the argument that the statute required proof that the firearm was used *as a weapon*, noting simply that "the words 'as a weapon' appear nowhere in the statute." 508 U.S. at 229.[14]

Likewise, there is no indication in PLCAA's negligent entrustment definition that the firearm must be used as a weapon or used to directly cause harm. As in *Smith*, "use" must be given its ordinary meaning. There is no question that the Camfour and Riverview defendants "used" or "employed" the Bushmaster rifle as an item for sale, or that they "derived service"

---

[14] The Remington Defendants argue that *Smith* is irrelevant because the Court's discussion of "use" arose in the context of criminal law and because the Supreme Court subsequently clarified in *Bailey v. United States*, 516 U.S. 137 (1995), that "use" of a firearm does not encompass mere storage. *See* Remington Mem. at 19. These observations are inapposite. First, the *Smith* Court did not derive the meaning of "use" by placing it in the context of the criminal laws; it looked to dictionary meanings to determine "the everyday meaning" of the word. 508 U.S at 228-29. And second, plaintiffs do not allege that the Camfour Defendants "used" the Bushmaster by storing it; they allege that defendants used the rifle by selling it. *See* FAC Count I ¶ 224 ("The Bushmaster Defendants knew, or should have known, that the Camfour Defendants' use of the product – supplying it to dealers who sell directly to civilians – involved an unreasonable risk of physical injury to others.").

from the rifle in the form of monetary compensation. As for Nancy Lanza, plaintiffs allege that she "bought the Bushmaster XM15-E2S to give to and/or share with her son in order to further connect with him." FAC ¶ 185. In doing so, she clearly "derived service" from the weapon.

The Camfour Defendants urge the Court to reject the plain meaning of use and adopt the interpretation of a New York court in *Williams v. Beemiller, Inc.*, No. 7056/2005 (N.Y. Sup. Ct. Erie Cnty. Apr. 25, 2011), *rev'd* 952 N.Y.S.2d 333 (N.Y. App. Div. 2012). *See* Camfour Mem. at 13-14. *Williams* – an unpublished opinion by a New York trial court that was reversed on appeal – lacks both precedential and persuasive authority. The Camfour Defendants rely on the trial court's ruling that PLCAA barred a negligent entrustment claim against a firearm distributor because it had not sold the firearm to "the ultimate shooter," and thus, did not sell "directly to the person misusing the product." Op. at 15. The only insight into that conclusion is the court's statement that "[a] review of the legislative history supports a narrow and limited exception to the general protections afforded manufacturers and sellers of firearms under the PLCAA." *Id.* The court does not explain what statutory ambiguity caused it to consult legislative history in the first place; nor does it mention that the legislative history it refers to is a letter to Congress from law professors that characterizes the bill in overreaching terms. *See* Op. at 15 (citing 157 Cong. Record H9004). Not only is such a letter an inappropriate source of legislative history, *see District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (legislative history "refers to the pre-enactment statements of those who drafted or voted for a law"), PLCAA's legislative history is hardly a model of clarity, *see supra* at I.B.3. [15]

[15] The Camfour Defendants also cite *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693 (Conn. Super. May 26, 2011), in support of their preferred interpretation of "use." *Gilland* holds, consistent with Connecticut common law, that the theft of a firearm fails to come within PLCAA's definition of negligent entrustment because there is no allegation that the seller "supplied the firearm for [the entrustee]'s use." *Id.* at *13. It is unclear how this point is helpful

2. Other Language in PLCAA Confirms the Plain Meaning of "Use"

Congress' word choices in other parts of PLCAA ought to conclusively put the defendants' argument on the meaning of "use" to rest. In the threshold definition of "qualified civil liability action," the statute proscribes certain actions that result "from the criminal or *unlawful misuse* of a qualified product." *See* 15 U.S.C. § 7903(5) (emphasis supplied). And in the provision governing product liability claims, PLCAA refers to scenarios where "the *discharge* of the [firearm] was caused by a volitional act that constituted a criminal offense[.]" *Id.* § 7903(5)(A)(v) (emphasis supplied).

Congress' decision to include the terms "discharge" and "unlawful misuse" in the text of PLCAA indicates that it knew how to employ narrower terms to refer to specific uses of firearms, and that it did so when such terms were appropriate. Consequently, "use" must be read not merely to mean "discharge" or "unlawful misuse." *See Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (quotation marks and citation omitted)); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 131 S. Ct. 1259, 1272 (2011) (holding that "law enforcement purposes" must be read to "involve more than just investigation and prosecution" because other parts of the statute "demonstrate [that] Congress knew how to refer to these narrower activities").

---

to the Camfour Defendants. Plaintiffs allege that Camfour supplied the Bushmaster XM15-E2S to Riverview for its use, *see* FAC Count II ¶ 224; they simply do not allege that Riverview was required to "use" the Bushmaster by causing injury to others. There is absolutely nothing in *Gilland* that suggests "use" should be read as narrowly as defendants would like.

Recently, in *Norberg v. Badger Guns*, No. 10-CV-20655 (Wis. Cir. Ct.), a Wisconsin court relied upon this precise argument in denying the defendant gun store's motion for summary judgment on plaintiffs' negligent entrustment claim:

> The defendants argue that the statutory definition of negligent entrustment [under PLCAA], that under the statutory definition, the person to whom Badger Guns supplied the firearm, which is Mr. Collins, was not the person, Mr. Burton, who thereafter used the firearm to harm the plaintiffs. . . . The Court does not believe that congress used the word, use, to mean exclusively discharge as the defendant suggests. In [§ 7903(5)(A)(v)], the statute uses the word, discharge. In section 15 U.S.C.A 7903(5)(b), congress chose to employ the term, use, not, discharge. . . . *Congress knew the difference between, discharge, and, use, and did not intend to use them interchangeably.*

Norberg, Oral Ruling on Def. Mot. Summ. Jud., at *19, 21(Jan. 30, 2014) (Conen, J.) (emphasis supplied), attached as Exhibit B.[16]

Relatedly, Congress repeatedly and exclusively used the term "misuse" in PLCAA when referring to the type of criminal activity that gives rise to a qualified civil liability action.[17] If

---

[16] Common sense also confirms the plain meaning of "use." There are many ways to "use" a firearm in a manner that involves an unreasonable risk of physical injury to self or others. Using a loaded handgun as a prop in a children's game can certainly be said to "involve[e] [an] unreasonable risk of physical injury." Likewise, someone who makes a "straw purchase" – that is, purchases a firearm for another person who is prohibited from buying it themselves – is clearly using the weapon in a manner involving an unreasonable risk of harm. Indeed, courts have held that negligent entrustment claims based on straw sale allegations are not barred by PLCAA. *See Norberg*, No. 10-CV-20655, at *21 (Ex. B) (denying summary judgment on negligent entrustment claim where plaintiffs alleged that the defendant gun store should have known it was participating in a straw sale); *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 788 (N.Y. Sup. Ct. 2014) (denying defendant gun store's motion to dismiss negligent entrustment claim because allegations that gun store should have known a straw sale was taking place was "not preempted by the clear language of the statute").

[17] *See* 15 U.S.C. § 7901(a)(3) (noting in the findings section that "lawsuits have been commenced … which seek money damages and other relief for the harm caused by the misuse of firearms"); *id.* at § 7901(a)(5) (finding that gun companies "should not be liable for the harm caused by those who criminally or unlawfully misuse firearms products"); *id.* at § 7903(b)(1) (purpose of PLCAA is to "prohibit causes of action against [gun companies] for the harm solely caused by the criminal or unlawful misuse of firearm products"); *id.* at § 7903(5)(A) (defining

Congress had intended the narrow meaning of "use" that defendants suggest, it could have easily signaled that by using the term "misuse" in the negligent entrustment definition – i.e., "…when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, *misuse* the product in a manner involving unreasonable risk of physical injury to the person or others."

3. The Common Law Meaning of "Use" Confirms Its Plain Meaning

The meaning defendants attempt to give the word "use" in PLCAA's negligent entrustment definition also ignores, and is fundamentally incompatible with, the common law meaning of that term – which has repeatedly been held to embrace successive entrustments. As discussed above, PLCAA's formulation of negligent entrustment mirrors the common law iteration of "use," as expressed by Section 390 of the Restatement. *See* Rest. (Second) § 390 (supplier of chattel subject to liability where entrustee is likely to "use [the chattel] in a manner involving unreasonable risk of physical harm to himself and others").

Recognizing that the word "use" in PLCAA's negligent entrustment definition is culled from the Restatement informs the meaning of that word. It is a well settled principle of statutory interpretation that "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). Thus, when language "'is

---

"qualified civil liability action," as any action "resulting from the criminal or unlawful misuse of a [firearm]").

obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *see also United States v. Soler*, 759 F.3d 226, 234 (2d Cir. 2014) (same).

Here, the relevant body of law applying and interpreting Section 390 rejects defendants' argument about the meaning of "use" in the context of negligent entrustment. Cases decided under Section 390 teach that the person to whom the chattel is entrusted need *not* be the person who later employs it to cause physical harm. That is, a claim for negligent entrustment can involve multiple entrustments, so long as they are reasonably foreseeable.

This common law rule is exemplified by the cherry bomb case discussed above, *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972). The *Collins* court upheld a verdict against a cement manufacturer under Section 390 for negligently entrusting cherry bombs to employees, even though two additional entrustments preceded injury to the plaintiff. In *Collins*, an employee of the defendant – who had been entrusted with cherry bombs for dislodging cement – gave several of the bombs to a group of children; one of those children then gave a bomb to the minor plaintiff, who was injured when she set it off. Thus, the employee's only "use" of the cherry bomb was removing it from work and giving it to a group of children. Moreover, neither the second nor third entrustment was within the control of the defendant manufacturer. The Eighth Circuit nevertheless upheld the verdict.

Framing the issue as one of foreseeability, the court determined that the manufacturer's decision to entrust the bombs to employees without adequate precautions – and with reason to know that employees were not exercising the proper level of care – created an unreasonable and foreseeable risk that a cherry bomb would fall into careless or unsuspecting hands and thereby

cause injury. *See* 453 F.2d at 513-514 (manufacturer's rules regarding use of the cherry bombs were lax and it had notice that "employees were not faithful in returning the unused cherry bombs or were using them in horseplay around the plant"). Consequently, the successive entrustments did not sever the causal chain between the defendant's negligence and the plaintiff's injuries.

Numerous other courts have likewise found common law negligent entrustment claims sufficient where the entrustee's use of the chattel was confined to giving or lending it to another. *See, e.g.*, *Rios v. Smith*, 95 N.Y.2d 647, 653 (N.Y. 2001) ("Thus, the evidence was legally sufficient for the jury to determine that [the defendant] created an unreasonable risk of harm to plaintiff by negligently entrusting the ATVs to his son, whose use of the vehicles involved lending one of the ATVs to Smith, another minor."); *Earsing v. Nelson*, 212 A.D.2d 66, 70 (N.Y. App. Div. 1995) (upholding denial of motion to dismiss negligent entrustment claim where minor purchaser of BB gun lent it to friend who shot and injured the plaintiff); *LeClaire v. Commercial Siding & Maint. Co.*, 308 Ark. 580, 583 (1992) (reversing trial court's dismissal of negligent entrustment claim where employer entrusted car to employee, who then entrusted it to another person; the court noted: "The real rub in this case is the fact that it involves two entrustments. That is not a bar to recovery."); *Schernekau v. McNabb*, 220 Ga. App. 772 (1996) (plaintiff properly stated negligent entrustment claim against woman who permitted her son to bring air rifle to campground, even though another camper – and not defendant's son – used the rifle to injure the plaintiff).

The Remington Defendants attempt to downplay the relevance of this common law precedent by arguing that the congruence between Section 390 and PLCAA is "not complete" and that any inference of Congressional intent to borrow the common law meaning is "purely

speculation." Remington Mem. at 16. Ignoring the fact that courts interpreting PLCAA have not only recognized this similarity, but have relied upon it to guide their assessment of negligent entrustment claims, *see* fn.6, *supra* (citing cases where courts have explicitly noted the parallels between Section 390 and PLCAA, including a Connecticut Superior Court case), the Remington Defendants purport to identify a "distinction" between the two texts from which Congress' intent to bar plaintiffs' claim should be inferred. They claim that PLCAA narrowed the Restatement's definition of negligent entrustment by specifying that the person who uses the product in a manner involving unreasonable risk of physical injury must be the same person to whom the defendant entrusts the product. *See* Remington Mem. at 16.

This straw man argument conflates the question of *who* must use the firearm in a manner involving an unreasonable risk of harm with the question of what *types of uses* are encompassed by PLCAA. Only the latter question is disputed. Plaintiffs have never claimed that a defendant is liable for negligent entrustment if *anyone* uses the firearm in an unreasonably risky manner. Plaintiffs acknowledge that both Section 390 and PLCAA revolve around the person to whom the chattel (or firearm) is supplied – the same person who then uses it in a manner involving an unreasonable risk of harm. Courts interpreting Section 390 have simply embraced an ordinary meaning of "use" that *includes* successive entrustments. Those decisions rightly inform the meaning of "use" in PLCAA's negligent entrustment definition.

Ultimately, however, defendants' focus on the meaning of the word "use" is not a textual argument at all. The premise of defendants' argument is an inaccurate and alarmist characterization of plaintiffs' claims: "Under Plaintiffs' expansive interpretation of 'use,' the initial lawful sale of any firearm, which passes through legal commerce and then is later used in crime, could be alleged to have been negligently entrusted." Remington Mem. at 17. And their

conclusion is no more than a self-serving rejection of that flawed premise: "[T]here is no way to reconcile that interpretation with the purpose of the PLCAA—to protect firearm sellers from lawsuits arising from the criminal use of firearms." *Id.* The essence of this argument is that, because PLCAA abrogates certain claims, every dispute as to the meaning of PLCAA must be resolved in their favor. This is not a recognized canon of statutory construction. To the contrary, "[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 127 (2d Cir. 2001).

E. Defendants' Focus on Legality is a Red Herring

The Remington Defendants (and to a lesser extent, the Camfour Defendants) spend considerable time establishing an undisputed point: the Bushmaster XM15-E2S was legal to sell and possess in Connecticut in 2010, and was lawfully sold to Nancy Lanza. *See, e.g.*, Remington Mem. at 2 ("The rifle had been lawfully purchased in 2010[.]"); *id.* at 2-3 ("Plaintiffs nevertheless seek to turn the lawful actions of the rifle's manufacturer into actionable wrongs[.]").

This emphasis on legal compliance misses the point. "There is all of the difference in the world between making something illegal and making it tortious. Making an activity tortious forces the people who derive benefit from it to internalize the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs. It does not proscribe it altogether." *McCarthy v. Olin Corp.*, 119 F.3d 148, 169-170 (2d Cir. 1997) (Calabresi, J., dissenting).

Indeed, legality is by no means synonymous with reasonableness. Thus, in *Kalina v. Kmart Corp.*, 1993 WL 307630 (Conn. Super. Aug. 5, 1993) (Lager, J.), the Superior Court refused to enter summary judgment on plaintiff's negligent entrustment of a firearm claim despite Kmart's argument that the standard of care was set by federal law regulating the sale of firearm: "KMart's position is that its only obligation was to require the purchaser to provide appropriate identification and to complete a Firearms Transaction Record Form, ATF Form 4473, pursuant to federal regulation." *Id.* at *3. The court declined to adopt such a rule, noting that "the trier of fact is, in this state, given a wide latitude in drawing the inference of negligence." *Id.* at 5. Thus "what KMart knew or should have known, in light of any other evidence that is introduced concerning the surrounding circumstances, should be left to the trier of fact." *Id.* at 5; *see also Short v. Ross*, 2013 WL 1111820 (denying motion to dismiss negligent entrustment claim against U-Haul even though U-Haul met all of its legal obligations).

Moreover, a reading of PLCAA as a whole demonstrates that Congress envisioned negligent entrustment as a claim arising from *legal* firearm sales. The provision immediately following the negligent entrustment provision preserves "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product[.]" 15 U.S.C. § 7903(5)(A)(iii). In other words, there is an entirely separate provision under PLCAA for causes of action arising from the illegal sale of a firearm. Interpreting the negligent entrustment provision to apply only to illegal sales would render it superfluous. This cannot have been Congress' intent. *See United States v. Kozeny*, 541 F.3d 166, 174 (2d Cir. 2008) ("When interpreting a statute, we are required to give effect, if possible, to every clause and word of a statute, and to avoid statutory interpretations that render provisions superfluous.") (quotation marks and citation omitted).

F. Plaintiffs Do Not Allege Product Liability Claims

Defendants also incorrectly conflate negligent entrustment with product liability. Their motivation for doing so is obvious: PLCAA bars any product liability claim where the harm was caused by a criminal act.[18] Thus, by calling plaintiffs' claims something other than what they are, defendants hope to divert attention from PLCAA's negligent entrustment provision – which they know plainly allows plaintiffs' claims to proceed. This maneuver must be rejected.

Product liability and negligent entrustment are distinct causes of action in Connecticut. Though the Connecticut Product Liability Act ("CPLA") encompasses allegations of negligence in addition to governing strict liability, those allegations must still concern a defective product. *See Hurley v. Heart Physicians*, P.C., 278 Conn. 305, 325 (2006) ("[A] product liability claim under the [CPLA] is one that seeks to recover damages for personal injuries . . . *caused by the defective product*.") (emphasis supplied). "[T]he essence of the tort" of negligent entrustment, by comparison, is the act of supplying something to another under "circumstances where an

---

[18] This is the reason *Jefferies v. D.C.*, 916 F. Supp. 2d 42 (D.D.C. 2013), which is relied upon by the Camfour Defendants, was dismissed immediately. In that case, the complaint made conclusory allegations against the manufacturer of the assault rifle used to kill the plaintiff's decedent, leading the court to conclude that the only plausible reading of the complaint was a product liability claim:

> Plaintiff makes a blanket assertion that [the manufacturer]'s negligence directly and/or indirectly contributed to Ms. Jones' death, and that [the manufacturer] owed a duty of care to Ms. Jones. … The Court cannot construe the allegations—or draw any plausible inferences from the allegations—in a way that would put this case under any of the exceptions of the PLCAA. The only exception that comes close is the one [for a product liability claim]. However, this exception does not apply "where the discharge of the product was caused by a volitional act that constituted a criminal offense." None of the exceptions to the PLCAA can plausibly apply in this case.

Id. at 46. In this context, the Camfour Defendants' assertion that *Jeffries* is indistinguishable from plaintiffs' claims is absurd. *See* Camfour Mem. at 10.

entrustor should know that there is cause why a chattel ought not to be entrusted to another." *Short*, 2013 WL 1111820, at *7.

Indeed, in *Short*, the court addressed and rejected the defendant's argument that plaintiff's negligent entrustment claim was barred by the CPLA's exclusivity provision. Although the plaintiff had separately alleged that U-Haul's truck had braking and acceleration defects, the negligent entrustment count arose from the entirely distinct allegation that U-Haul should have known the truck would be used at a football tailgate in a pedestrian-dense area around people who had been consuming alcohol. Thus, that negligence was unrelated to the alleged product defect and did not come within the CPLA's purview:

> The defendant is correct that the CPLA provides the exclusive remedy to a plaintiff who claims liability as a result of a defective product. The defendant is incorrect, however, in its assertion that count two [for negligent entrustment] alleges that a defective product caused the injury. As discussed, *supra*, the plaintiff has alleged sufficiently a claim for negligent entrustment. Accordingly, . . . the plaintiff necessarily alleges independent negligence, not negligence based upon allegations that the truck was defective. Thus, [the negligent entrustment] count is not precluded by the CPLA's exclusivity provisions.

Id. at *12.

Here, plaintiffs make no allegation that the Bushmaster XM15-E2S was defective – indeed, it functioned precisely as intended (that is, as a mass casualty weapon). Moreover, plaintiffs do not assert that defendants should be liable simply because the XM15-E2S is an unreasonably dangerous product to sell – indeed, it is an ideally dangerous product for a large consumer base (that is, military and law enforcement personnel). Plaintiffs' allegations focus on defendants' knowledge of the unreasonable risks associated with selling the Bushmaster XM15-E2S to the civilian market in 2010. Those allegations speak to the act of entrusting, not to a defect in the weapon. As such, defendants' reliance on the CPLA is inapt.

V. PLAINTIFFS' CUTPA CLAIMS SATISFY PLCAA AND CONNECTICUT LAW

In what is usually called the "predicate statute" provision of PLCAA, PLCAA leaves intact claims against gun sellers for knowing violations of state statutes applicable to the sale or marketing of firearms. PLCAA does *not* bar "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product[.]" 15 U.S.C. § 7903(5)(A)(iii). Since CUTPA is "applicable to the sale and marketing" of guns in Connecticut, it is an appropriate predicate statute.

Although defendants have filed a new round of briefing on the predicate provision and CUTPA, the core issues before the Court remain the same. The Second Circuit in *Beretta* held that statutes such as CUTPA are appropriate predicates. As the Court has already discerned, the real issue is whether plaintiffs have (non-jurisdictional) standing to assert CUTPA claims. And plaintiffs do have such standing, not because they were in a consumer relationship with defendants, but because of the nature of defendants' conduct. Defendants' Motions to Strike the CUTPA claims must be denied.

A. The Court Cannot Strike Entire Counts on the Basis of Defendants' CUTPA Arguments

Defendants move to strike entire counts against them, based on their CUTPA arguments. The Court cannot do so because the negligent entrustment allegations and the CUTPA allegations are made in the same counts.[19] "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." *Fort Trumbull Conservancy, LLC*, 262 Conn. at 498. For this reason alone, defendants' CUTPA arguments should be rejected.

[19] Defendants could have filed Requests to Revise seeking to have the claims divided into separate counts. They elected not do so, waiving that right. *See* Prac. Bk. §§10-35, 10-38.

B. The Second Circuit's Decision in *Beretta* Indicates CUTPA Is an Appropriate Predicate Statute

PLCAA provides that a qualified action "shall not include":

> an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . .

15 U.S.C. § 7903(5)(A)(iii).

This provision has been construed by the Second and Ninth Circuits, the District of Columbia Court of Appeals, the Indiana Appellate Court and the Alaska Supreme Court. *Beretta*, 524 F.3d at 399-404; *Ileto v. Glock*, 565 F.3d 1126, 1131-38 (9th Cir. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169-72 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. App. 2007), *transfer denied*, 915 N.E.2d 978 (Ind. 2009); *Estate of Kim*, 295 P.3d at 393-94.

Of these decisions, the Second Circuit's decision in *Beretta*, while not binding on the Court, ought to be very significant in the Court's analysis. *See Turner v. Frowein*, 253 Conn. 312, 340-41 (2000) (decisions of the Second Circuit concerning issues of federal law, "though not binding [on a Connecticut court], are particularly persuasive").[20] Defendants argue that *Beretta* supports their position. Remington Mem. at 20, 23, 25-26; Camfour Mem. at 24-28. Their reliance on *Beretta* is completely misplaced.

---

[20] The Remington Defendants rely heavily on *Ileto*, in which the Ninth Circuit construed the predicate exception much more narrowly than did the Second Circuit in *Beretta*. Remington Mem. at 23, 24, 26. The Camfour Defendants rely on an even less persuasive authority, the ruling of the District Court in *Ileto*. Camfour Mem. at 27. Because the Second Circuit and the Ninth Circuit disagree about how to read the predicate provision, the Ninth Circuit's ruling in *Ileto* has little persuasive weight, and the *Ileto* District Court's ruling has even less.

Beretta holds that the predicate provision encompasses both statutes "applied to the sale and marketing of firearms" and statutes that "clearly can be said to implicate the purchase and sale of firearms." *Beretta*, 524 F.3d at 404. CUTPA, of course, fits both of these categories. In *Beretta*, the City brought nuisance and other claims against gun makers and sellers, asserting they distributed and sold firearms in a manner that increased their use by criminals. The City argued that its statutory nuisance claim satisfied PLCAA's predicate provision. On appeal Judge Miner, writing for a two-judge majority, rejected the statutory public nuisance predicate but indicated that the predicate provision encompasses some statutes of general application.

The *Beretta* court recognized that the key question is what "applicable" means: "Central to the issue under examination is what Congress meant by the phrase 'applicable to the sale or marketing of [firearms].' The core of the question is what Congress meant by the term 'applicable.'" *Beretta*, 524 F.3d at 399. Rather than use the plain meaning of "applicable," the court narrowed that meaning in certain respects.[21] It emphasized that:

> We find nothing in the statute that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception. *We decline to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute.*

524 F.3d at 399-400 (emphasis supplied). It determined finally:

> In sum, *we hold* that the exception created by 15 U.S.C. § 7903(5)(A)(iii): (1) does not encompass New York Penal Law § 240.45; *(2) does encompass statutes* (a) that expressly regulate firearms, *or (b) that courts have applied to the sale and marketing of firearms; and (3) does encompass statutes that do not*

[21] For example, the court determined that in light of subsections (I) and (II) of the predicate provision, it would find a "textual definition" of "applicable," rather than follow its plain meaning. *Id.* at 401. (This was an application of the rule of *eiusdem generis*.) It then turned to the legislative history. While the Court should look to the *City of New York* decision as persuasive, it need not make the same interpretive choices.

> *expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.*

524 F.3d at 404 (emphasis supplied). Thus, while it is true that the Second Circuit dismissed the City's statutory nuisance claim, the Second Circuit's holding concerning the meaning of PLCAA's predicate provision is the passage above.[22]

1. CUTPA Is an Appropriate Predicate under Two of the Three *Beretta* Categories

CUTPA is an appropriate predicate under *Beretta* category 2(b) ("statutes . . . that courts have applied to the sale and marketing of firearms") and category 3 ("statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms"). *See Beretta*, 524 F.3d at 404. The purpose of CUTPA is well established under Connecticut law:

> [T]he purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce, and whether a practice is unfair depends upon the finding of a violation of an identifiable public policy. . . . CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative provision of the act, [General Statutes] § 42–110b(a), states merely that no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Trade or commerce, in turn, is broadly defined as the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

---

[22] *City of New York*'s determination that the nuisance statute would not serve as a predicate must be understood in the context of prior decisions by New York's high courts rejecting like claims. In 2001, the New York Court of Appeals held that gun manufacturers did not owe victims of gun violence a general duty of care in connection with the marketing and distribution of hand guns. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 230-31, 240 (N.Y. 2001). Two years later, the Appellate Division of the New York Supreme Court affirmed the dismissal of public nuisance claims brought against gun manufacturers, distributors, and sellers in connection with their marketing and sales practices, finding that *Hamilton* foreclosed such claims. *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194-95 (N.Y. App. 2003). In other words, the statutory nuisance claim did not fail because the statute in issue was generally applicable; it failed because New York's high courts had already indicated their disapproval of such a claim.

Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Devel. Corp., 245 Conn. 1, 42 (1998) (citation omitted). CUTPA works under 2(b) because CUTPA has been applied to the sale and marketing of firearms; it works under 3 because CUTPA clearly implicates and is applicable to the sale and marketing of firearms. *See Salomonson v. Billistics, Inc.*, 1991 WL 204385, at *12 (Conn. Super. Sept. 27, 1991) (Freeman, J.T.R.) (applying CUTPA to transaction involving firearms; stating that "[t]he instant transaction for the sale, manufacture and delivery of remanufactured weapons . . . meets the statutory definition of trade or commerce, C.G.S. § 42-110a(4)").

2. Defendants Ignore *Beretta*'s Holding and the Plain Language of the Predicate Provision

Knowing *Beretta*'s persuasive weight, defendants pay lip service to that decision while asking the Court to construe the predicate provision far more narrowly than *Beretta* did. The long list of federal, state and municipal statutes at pages 21-22 of the Remington Defendants' brief is a smoke screen: Remington does not want the Court to focus on what *Beretta* says.

Defendants complain that if CUTPA is a predicate statute, the reach of the predicate provision will be too broad, Remington Mem. at 25-29; Camfour Mem. at 27–28. Their construction of the predicate provision – as allowing only predicates which specifically mention firearms – was advanced *and rejected* in *Beretta*:

> The Firearms Suppliers argued that a predicate statute must explicitly mention firearms and that a general statute could not serve as a predicate statute even if a state's highest court were to construe that statute as applicable to firearms. . . . We disagree with this argument and, as set forth in more detail below, do not construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations by state courts.

Beretta, 524 F.3d at 396 (citation omitted); *see also id.* at 399-400, 404. In addition, defendants ignore the language of the predicate provision, which *is* broad. Plain meaning analysis, which

defendants agree is the correct approach, requires the Court to give full weight to Congress' choice of words in the predicate provision, not to words defendants would prefer.

Finally, the Remington Defendants assert that if knowledge of wrongfulness is not an element of CUTPA itself, CUTPA cannot be a predicate, Remington Mem. at 29, again ignoring the wording of the predicate provision. PLCAA requires proof that the predicate statute was knowingly violated, not that knowledge be an element of the predicate statute itself. *See* 15 U.S.C. § 7903(5)(A)(iii).

C. The Plain Language of the Predicate Provision Again Confirms That CUTPA Is an Appropriate Predicate Statute

While *Beretta*'s interpretation of the predicate provision is highly persuasive, it is not binding. *See Turner*, 253 Conn. at 340-41 (Second Circuit decisions "not binding" but "particularly persuasive"). Federal canons of construction require that the plain meaning of statutory language be given effect. Thus, the plain meaning approach used by the dissenting Second Circuit Judge in *Beretta* and by the District Court Judge in that case is also persuasive authority. *See Dark-Eyes.*, 276 Conn. at 571 (Connecticut courts follow plain meaning rule in construing federal statutes).

All four Second Circuit judges who considered the predicate provision (Judges Miner, Cabranes, Katzmann, and Weinstein) agreed that "applicable" is a broad term, meaning "capable of being applied." Two judges (Judges Weinstein and Katzmann) determined that the meaning of the predicate provision was clear on its face and would simply have implemented its plain language. *Beretta*, 524 F.3d at 404-05 (Katzmann, J., dissenting); *Beretta*, 401 F. Supp. 2d at

261 (Weinstein, J.); *see also City of Gary*, 875 N.E.2d at 434 (predicate provision is unambiguous and encompasses statutes "applicable to the sale or marketing" of firearms).[23]

Under either the *Beretta* construction or the plain meaning construction of the predicate provision, plaintiffs' CUTPA claims come within PLCAA's predicate provision.

D. CUTPA Authorizes Plaintiffs' Claims

Defendants assert that plaintiffs' CUTPA claims cannot survive because they are really product liability claims, plaintiffs are not consumers or competitors, CUTPA does not allow personal injury damages, the CUTPA claims are time-barred, and the CUTPA claims are pre-empted by regulation. Remington Mem. at 22-24; Camfour Mem. at 20-24. This scattershot attack is easily answered: plaintiffs are not making product liability claims; CUTPA allows "any person" to seek relief under its terms; CUTPA does allow personal injury and wrongful death damages; the CUTPA claims are not time-barred because the wrongful death limitations period governs them; and the record is not ripe for the Court to address a regulation defense.

1. Plaintiffs' CUTPA Claims Are Not Product Liability Claims

Plaintiffs' CUTPA claims are not foreclosed by Connecticut's Products Liability Act (CPLA). Plaintiffs' claims are founded in negligent entrustment, not product liability. *See*

---

[23] In addition, the *Beretta* majority's use of the interpretive principle of *eiusdem generis* to narrow the predicate provision somewhat is problematic. *Beretta* looks to subparts (I) and (II) of the predicate provision and determines that the examples listed there limit the scope of the provision. *Eiusdem generis* is "only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Gooch v. U.S.*, 297 U.S. 124, 128 (1936). Far from limiting the predicate provision, the subparts broaden it by "including" lists of additional claims against gun manufacturers and sellers that are not barred by PLCAA. "'[I]ncludes' is a term of enlargement, not of limitation." *Alarm Indus. Communications Committee. v. F.C.C.*, 131 F.3d 1066, 1070 (D.C. Cir. 1997); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) (the term "including" indicates an "'illustrative and not limitative' function" that "provide[s] only general guidance" about Congressional intent).

Argument Part IV.F. above. Plaintiffs do not claim the XM15-E2S is a defective product in any respect. Thus defendants' arguments based on the CPLA, Remington Mem. at 29-30, 33-34; Camfour Mem. at 22-23, must be rejected.

The CPLA's exclusivity provision "makes the product liability act the exclusive means by which a party may secure a remedy for an injury *caused by a defective product*." *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 125-26 (2003) (emphasis supplied) (discussing Conn. Gen. Stat. § 52-572n(a)). A CUTPA claim is not a CPLA claim if the CUTPA claim is not premised on product defect or failure to warn of a product defect.

A few Superior Court have recognizing and applied this aspect of the *Gerrity*. *See, e.g.*, *Osprey Properties, LLC v. Corning*, 2015 WL 9694349, at *5, 7 (Conn. Super. Dec. 11, 2015) (Arnold, J.) (determining CUTPA claim was not subsumed by the CPLA where the plaintiff's CUTPA allegations concerned the defendants' conduct, not product defect *per se*); *cf. Dibello v. C.B. Fleet Holding Co, Inc.*, 2007 WL 2756374, at *3 (Conn. Super. Aug. 31, 2007) (Mintz, J.) (striking CUTPA claim incorporating failure to warn allegations as subsumed by CPLA because it did not allege malfeasance by the defendants).

The Remington defendants argue that because plaintiffs make allegations concerning Remington's marketing of AR-15s, the CUTPA claims must be CPLA claims. Remington Mem. at 30. CPLA marketing claims would hinge either on an underlying defective product or on failure to warn (of a product defect or unsafe characteristics). As *Gerrity* observes, the CPLA was not designed to eliminate "claims that previously were understood to be outside the traditional scope of a claim for liability based on a defective product." *Gerrity*, 263 Conn. at 128. Plaintiffs' CUTPA claims are exactly that. Product liability cases seek redress for harm caused by a defective product. Plaintiffs here allege no such injuries. The XM15-E2S

functioned with the exact degree of lethality that defendants intended. Moreover, defendants' marketing of that weapon deliberately and accurately portrayed its assaultive capacity and military use. Plaintiffs' CUTPA claims are thus clearly distinguishable from claims subsumed by the CPLA.

Defendants refer the Court to cases premised on allegations of product defect, including marketing of a defective product, failure to warn, or both. *See Fraser v. Wyeth*, 857 F. Supp. 2d 244, 258 (D. Conn. 2012) (design defect and failure to warn regarding risk of hormone therapy medication); *Johannsen v. Zimmer, Inc.*, 2005 WL 756509 (D. Conn. Mar. 31, 2005) (defective hip prosthesis); *Mountain W. Helicopter, LLC v. Kaman Aerospace Corp.*, 310 F. Supp. 2d 459, 462-64 (D. Conn. 2004) (defective helicopter clutch); and *Hurley v. Heart Physicians*, 278 Conn. 305 (2006) (defectively designed pacemaker; failure to warn about proper functioning of pacemaker). None of these cases is apposite, because plaintiffs here make no claim for product defect, marketing of a defective product, or failure to warn.

2. Any Person Who Suffers Any Ascertainable Loss of Money or Property May Sue under CUTPA

Our Supreme Court has allowed consumers, competitors, and those in business relationships to proceed under CUTPA. This is not the limit, however, of CUTPA's reach. CUTPA's plain language gives a right to sue to *"[a]ny person* who suffers *any ascertainable loss* of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [§] 42-110b[.]" Conn. Gen. Stat. § 42-110g (emphasis supplied).

Section 1-2z directs the Court to look both to "the text of the statute itself" and to "its relationship to other statutes." Conn. Gen. Stat. § 1-2z. CUTPA's textual definition of who may seek relief – "any person who suffers any ascertainable loss of money or property" – serves its remedial purpose. *See* Conn. Gen. Stat. § 42–110b(d) ("It is the intention of the legislature that

this chapter [CUTPA] be remedial and be so construed.") The statute seeks to remedy unfair trade practices by "encourag[ing] litigants to act as private attorneys general[.]" *Thames River Recycling, Inc. v. Gallo*, 50 Conn. App. 767, 794-95 (1998). Authorizing "any person" harmed by an unfair trade practice to pursue a CUTPA action serves the statute's purpose by recognizing the greatest number of "private attorneys general" to serve and enforce the statute's goals.

CUTPA's relationship with other statutes reinforces this understanding of the meaning of Section § 42-110g. Many Connecticut statutes provide that violation of their provisions is a violation of CUTPA. These statutes, like CUTPA, are best served by the application of § 42-110g's broad textual definition of the plaintiff class. As the legislature knew, Connecticut's Attorney General could not possibly investigate and pursue actions for violations of all of these statutes. The broad private right of action – and the resulting broad class of plaintiffs who may bring suit – is necessary if these statutes are to be enforced. *See, e.g.*, Conn. Gen. Stat. § 14-106d(b) (the manufacturing, importing, offering for sale and sale of nonfunctional airbags are CUTPA violations); Conn. Gen. Stat. § 19a-904d (health information blocking is a CUTPA violation); Conn. Gen. Stat. § 21-83e (violation of state statutes concerning mobile home parks is a CUTPA violation); Conn. Gen. Stat. § 42-300 (violation of statutes setting requirements for sweepstakes is a CUTPA violation); Conn. Gen. Stat. § 48-30 (misrepresentation of power to acquire property by eminent domain is a CUTPA violation). For CUTPA to serve its full remedial purpose, any person who suffers any ascertainable loss due to such a violation should be permitted to act as a "private attorney general" and bring a CUTPA claim.[24]

---

[24] Since CUTPA's text and relationship with other statutes do not create any ambiguity as to the breadth of the plaintiff class, the Court need not refer to CUTPA's legislative history. *See* Conn. Gen. Stat. § 1-2z. In any event, the legislative history supports this construction, because the legislature eliminated CUTPA's privity requirement in 1979. P.A. 79-210; *see also* Ex.C, Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1979 Sess., pp. 1159-1160, Remarks of

Thus in *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480 (1995), the Court correctly noted that the language of Section 42-110g does not single out any particular relationship as conferring CUTPA standing. *Larsen* reads CUTPA as applying to competitors and consumers, but does not limit the statute's reach to such relationships:

> [T]here is no indication in the language of CUTPA to support the view that violations under the act can arise only from consumer relationships. *Indeed, various provisions of CUTPA reveal that the opposite is true.* CUTPA provides a private cause of action to "any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . ." General Statutes § 42–110g(a). "Person," in turn, is defined as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity . . . ." General Statutes § 42–110a(3). If the legislature had intended to restrict private actions under CUTPA only to consumers or to those parties engaged in a consumer relationship, it could have done so by limiting the scope of CUTPA causes of action or the definition of "person," such as by limiting the latter term to "any party to a consumer relationship." "The General Assembly has not seen fit to limit expressly the statute's coverage to instances involving consumer injury, and we decline to insert that limitation."

232 Conn. at 492-97 (trial court erred in failing to consider the defendant's activities rather than his relationship to the plaintiff as a basis for a CUTPA claim) (emphasis supplied and citations omitted); *see also Fink v. Golenbock*, 238 Conn. 183, 213 (1996) ("it was not the employment relationship that was dispositive [in *Larsen*], but the defendant's conduct"); *McLaughlin Ford, Inc., v. Ford Motor Co.*, 192 Conn. 558, 566-67 (1984) (plaintiff's CUTPA standing determined solely by reference to § 42-110g(a)).

Ass't Atty Gen. Arnold Reinger ("The deletion will correct an ambiguity which now exists by virtue of a 1975 amendment to the Connecticut Unfair Trade Practices Act. . . . The amendment will now allow a suit by any person who suffers any ascertainable loss of money or property. Numerous arguments have been raised in both state and federal courts that the plaintiff, in order to sue, must be a purchaser or a lessee of a seller or lessor. Clarification of Section 42-110GA is essential in order to avoid needless litigation of the particular phrase now found in the statute"); Ex. D, 145 S. Proc., Pt. 8, 1979 Sess., p. 2575, Remarks of Sen. Casey ("The Attorney General's office is hampered in this enforcement effort by limited staff. Private litigation under this act is essential[.]").

Ganim v. Smith & Wesson Corp., 258 Conn. 313, 359-61 (2001), is an important indication that plaintiffs here should be permitted to pursue their CUTPA claims. In *Ganim*, the City of Bridgeport brought suit against gun manufacturers and dealers asserting nuisance, product liability and CUTPA claims. The City claimed its own damages – it did *not* claim damages on behalf of individual victims of gun violence. The Court dismissed the case because the City's claims were too derivative. *Id.* at 355. It observed, however, that the primary victims of gun violence were appropriate plaintiffs in such a suit.[25]

Defendants rely on a number of cases that they argue limit CUTPA. Remington Mem. at 31-32; Camfour Mem. at 21-22. In *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157-58 (2005), the Court did reject a CUTPA claim (in the context of a motion to strike) because the plaintiff was neither a consumer, nor a competitor, nor in a business relationship with the defendant. The *Ventres* court did not, however, reconcile its ruling with its statements in *Ganim*.[26] *See* 12 Conn. Prac. Series, Langer *et al.*, *Unfair Trade Practices* § 3.6 at n.39 (online ed. 2015-2016) (observing that *Ganim* "suggest[s] that the breadth of the class of potential CUTPA plaintiffs is still an open question"). *Pinette v. McLaughlin*, 96 Conn. App. 769 (2006),

---

[25] The *Ganim* Court stated: "the harm suffered by the potential other plaintiffs, which include all of the primary victims mentioned previously [victims of gun violence], exists at a level less removed from the alleged actions of defendants. They include, for example, all the homeowners in Bridgeport who have been deceived by the defendants" misleading advertising, all of the persons who have been assaulted or killed by the misuse of handguns, and all of the families of the persons who committed suicide using those handguns." *Id.* at 360. Recovery *by those plaintiffs* would more likely be appropriate: "We have already identified some of the directly injured parties who could presumably, without the attendant [remoteness] problems [the City has as a plaintiff] . . . , remedy the harms directly caused by the defendants" conduct and thereby obtain compensation[.]" *Id.* at 359. The Court did not reach the substantive sufficiency of plaintiffs" CUTPA allegations. *Id.* at 372.

[26] *Ventres* also does not engage in a § 1-2z plain meaning analysis of § 42-110g. *See Ventres*, 275 Conn. at 156-58.

a case in which the court entered summary judgment on a CUTPA claim because the plaintiff was not a consumer, a competitor or in a business relationship with the defendant, relies on *Vacco v. Microsoft Corp.*, 260 Conn. 59, 88-89 (2002), which in turn relies on *Ganim* to describe the boundaries of who may bring a CUTPA claim. We acknowledge that these cases and the others cited (*e.g.*, *Caltabiano v. L&L Real Estate Holdings II, LLC*, 2009 WL 1054288 (Conn. Super. Mar. 20, 2009), *aff'd*, 128 Conn. App. 84 (2011)) support defendants' construction of CUTPA; we do not view them, however, as determinative in light of *Ganim*, the language of the statute itself, and our rules of statutory construction under Section 1-2z.

In the end, the language of Section 42-110g(a) must determine which plaintiffs may bring CUTPA claims. Plaintiffs allege here that they suffered ascertainable financial loss. *E.g.* FAC ¶ 229. This allegation should suffice to enable plaintiffs to proceed under CUTPA.

3. CUTPA Provides a Remedy for Personal Injury and Wrongful Death

Defendants assert that CUTPA does not allow recovery for "damages flowing from personal injury or wrongful death." Remington Mem. at 32; Camfour Mem. at 22-23.. But the reverse is true: "[a] majority of trial courts addressing the issue have . . . held that damages for personal injuries can be recovered under CUTPA." 12 *Conn. Prac. Series* § 6.7 at n.19 (citing cases). Indeed, this Court has previously noted that "the Connecticut Supreme Court, in *Stearns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1, 10 . . . (2008), stated that the CUTPA claim would include a claim for personal injuries . . . ." *Builes v. Kashinevsky*, 2009 WL 3366265, at *4 (Conn. Super. Sept. 15, 2009) (Bellis, J.); *see also, e.g.*, *Abbhi v. AMI*, 1997 WL 325850, at *3-4 (Conn. Super. June 3, 1997) (Silbert, J.) (explaining why plaintiffs may recover under CUTPA for both personal injury and wrongful death). Therefore this challenge also fails and plaintiffs' complaint adequately presents viable claims under CUTPA.

Remington cites to *Gerrity* once again to support its argument that a plaintiff may not recover for personal injuries or wrongful death under CUTPA. Remington Mem. at 32 (citing *Gerrity*, 263 Conn. 129-30). The Court in *Gerrity*, however, explicitly limited its opinion, and did not reach the question of what damages are available under CUTPA. *Gerrity*, 263 Conn. at 131 ("The types of damages permitted under CUTPA and to whom they are available, is beyond the scope of this certified question."). Remington also misunderstands *Haynes v. Yale New Haven Hosp.*, 243 Conn. 17 (1997). *Haynes* holds that simple medical negligence is not a proper basis for a CUTPA claim; it does *not* hold that the plaintiff's death is not compensable under CUTPA. *Haynes* suggests the Supreme Court believes death *is* compensable under CUTPA, if the plaintiff can prove the elements of CUTPA.

4. The CUTPA Claims Are Timely Filed

Defendants assert that the CUTPA claims against them are time-barred. Remington Mem. at 32-33; Camfour Mem. at 23-24. They are not. Although the claims are asserted under CUTPA, they are governed for limitations purposes by the wrongful death statute. *See Pellechia v. Connecticut Light & Power Co.*, 52 Conn. Supp. 435 (2011) (holding that CUTPA claims seeking damages for wrongful death were governed by § 52-555), *aff'd*, 139 Conn. App. 88 (2012), *cert. denied*, 307 Conn. 950 (2013).

The court in *Pellechia* explained:

> "The wrongful death statute; General Statutes § 52–555; is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought." *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 295, . . . (1993). "As a result, where damages for a wrongful death are sought, the pertinent statute of limitations is to be found in § 52–555 rather than the statutes of limitations for torts or negligence generally." *Spruill v. Ahmed*, . . . 2003 WL 1477662 (March 10, 2003) (*Sferrazza, J.*) (34 Conn. L. Rptr. 239). "This rule, however, does not bar the plaintiff from advancing alternative theories of recovery, or causes of action, pursuant to the wrongful death statute." . . .

> *Monterio v. Crescent Manor*, , . . . 2004 WL 1245906 (May 21, 2004) (*Matasavage, J.*).
>
> Here, all of the plaintiff's claims against the CL & P defendants seek damages arising from the death of the plaintiff's decedent in July, 2006. While he has advanced different theories of liability (such as negligence, recklessness, and violation of the Connecticut Unfair Trade Practices Act [CUTPA], General Statutes § 42–110a et seq.), they all are subject to the two year limitations period set forth in § 52–555. *See Greco v. United Technologies Corp.*, supra, 277 Conn. at 348–50.

Pellecchia, 52 Conn. Supp. at 445 (portions of citations omitted).

The Remington Defendants argue that *Pellecchia* is inapposite. Remington Mem. at 33. Once again, they ignore a straightforward holding. *Pellechia* holds that Section 52-555 governs a claim for wrongful death made under CUTPA. The Appellate Court adopted that holding, and it is binding on the Court. *See Pellecchia,* 139 Conn. App. at 90 ("Because the trial court thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issue."). The Camfour Defendants fail to cite *Pellecchia*, let alone distinguish it.

The Remington Defendants then contend that the CUTPA statute must *also* apply. But that is not at all what *Pellechia* holds, nor would it make sense to impose the strictures of two limitations periods on the class of plaintiffs who assert CUTPA wrongful death claims. The Supreme Court's reasoning in *Greco v. United Techs. Corp.*, 277 Conn. 337, 349 (2006), confirms *Pellechia's* holding. In *Greco*, the plaintiff asserted a wrongful death claim under Section 52-577c(b). The Court found that in an action for wrongful death, Section 52-577c(b) did not trump the limitations period set by Section 52–555, in part because the legislature could easily have enumerated Section 52-555, along with Sections 52-577 and 52-577a, as one of the statutes of limitation preempted by Section 52-577c(b). As the legislature did not do so, this was

"strong evidence" that the legislature did not intend for Section 52-577c(b) to preempt Section 52-555.[27]

The plaintiffs concede that Natalie Hammond's CUTPA claim, which does not sound in wrongful death, is time-barred.

5. Defendants' Argument Based on Section 42-110c Is Premature

Defendants assert that the CUTPA counts must be stricken based on CUTPA's regulatory preemption exception, Section 42-110c.[28] Remington Mem. at 35; Camfour Mem. at 21 n.14. These arguments are both improper and premature. The First Amended Complaint does not allege the extent to which the actions in issue are regulated; defendants supply those factual claims themselves. In ruling on a motion to strike, the Court cannot "cannot be aided by the assumption of any facts not . . . alleged [in the complaint.]" *Liljedahl Bros.*, 215 Conn. at 348.

A Section 42-110c(a) defense, moreover, should be specially alleged and then raised by motion for summary judgment. "[A]pplicability of § 42–110c(a)(1) was not properly before the court in connection with the motion to strike. The special defense asserting such a claim . . . was not made part of the record until after the motion to strike was denied." *Higbie v. Hous. Auth. of*

---

[27] Remington then claims there is a Superior Court "split" as to whether CUTPA survives death. Remington Mem. at 33 n.14. This is not so. *Pellecchia*'s affirmance makes it clear that a CUTPA claim does survive death. The Remington Defendants cite *Touchette v. Smith*, 1993 WL 410112, at *4 (Conn. Super. Oct. 5, 1993) (Booth, J.). *Touchette* was decided well before *Pelleccia* was affirmed, as was *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 174 (D. Conn. 2002). *Abbhi*, 1997 WL 325850, at *4, thoroughly rejects *Touchette*'s reasoning in any event. *See id.* ("To read CUTPA so as to preclude a claim based on the fortuity of death would be contrary to the statute's remedial purpose.").

[28] Section 42-110c(a)(1) provides: "(a) Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States[.]" Subsection (b) provides that "[t]he burden of proving exemption" is on "the person claiming the exemption."

Town of Greenwich, 2015 WL 5236728, at *3 (Conn. Super. July 31, 2015) (Povodator, J.); *cf. Connelly v. Housing Authority of New Haven*, 213 Conn. 354, 359 (1990) (determining – on the basis of a record created on summary judgment – that the New Haven Housing Authority is a "creature of statute" and its actions are pervasively regulated by HUD and the Statement Department of Housing).

6. The Camfour Defendants Waived the Opportunity to Challenge the Factual Sufficiency of the Allegations Against Them

The Camfour Defendants argue that plaintiffs have not sufficiently or particularly alleged the factual bases for the CUTPA claims against them. Camfour Mem. at 21. By electing not to file a Request to Revise, Camfour waived this argument. "[T]he proper motion to challenge a failure to plead facts is a request to revise and not a motion to strike." *Salzano*, 2005 WL 2502701, at *1; *Poseidon Group, Inc.*, 2004 WL 2591963, at *1 ("[I]f the plaintiff desired a fuller factual statement of the defense, it should have filed a request to revise."); *Durkin*, 2001 WL 490772, at *1 ("Failure to plead facts is a defect of form which should have been addressed by a request to revise.").

VI. CONCLUSION

For the reasons set forth above, defendants' Motions to Strike should be denied.

THE PLAINTIFFS,

By /s/ Joshua Koskoff

JOSHUA D. KOSKOFF
ALINOR C. STERLING
KATHERINE MESNER-HAGE
jkoskoff@koskoff.com
asterling@koskoff.com
khage@koskoff.com
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
PHONE: (203) 336-4421
FAX: (203) 368-3244
JURIS #32250

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, postage prepaid, and emailed this day to all counsel of record, to wit:

For Bushmaster Firearms International LLC, a/k/a;
Freedom Group, Inc., a/k/a;
Bushmaster Firearms, a/k/a;
Bushmaster Firearms, Inc., a/k/a;
Bushmaster Holdings, Inc., a/k/a
Remington Arms Company, LLC, a/k/a;
Remington Outdoor Company, Inc., a/k/a

Jonathan P. Whitcomb, Esq.
Diserio Martin O'Connor & Castiglioni, LLP
One Atlantic Street
Stamford, CT 06901
jwhitcomb@dmoc.com
TEL: (203) 358-0800
FAX: (203) 348-2321

For Remington Arms Company, LLC, a/k/a;
Remington Outdoor Company, Inc., a/k/a

Andrew A. Lothson, Esq.
James B. Vogts, Esq.
Swanson Martin & Bell, LLP
330 North Wabash, #3300
Chicago, IL 60611
alothson@smbtrials.com
jvogts@smbtrials.com
TEL: (312) 321-9100
FAX: (312) 321-0990

For Camfour, Inc.;
Camfour Holding, LLP, a/k/a

Scott Charles Allan, Esq.
Renzulli Law Firm, LLP
81 Main Street, #508
White Plains, NY 10601
sallan@renzullilaw.com
TEL: (914) 285-0700
FAX: (914) 285-1213

For Riverview Sales, Inc.;
David LaGuercia
Peter Matthew Berry, Esq.
Berry Law LLC
107 Old Windsor Road, 2nd Floor
Bloomfield, CT 06002
firm@berrylawllc.com
TEL: (860) 242-0800
FAX: (860) 242-0804

/s/ Joshua Koskoff
JOSHUA D. KOSKOFF
ALINOR C. STERLING
KATHERINE MESNER-HAGE

SUPREME COURT OF THE STATE OF CONNECTICUT

S.C. 19832
S.C. 19833

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL

V.

BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A, ET AL

APPENDIX PART 2 TO BRIEF OF DEFENDANTS-APPELLEES

TO BE ARGUED BY: JAMES VOGTS AND CHRISTOPHER RENZULLI

FOR DEFENDANTS-APPELLEES:

JAMES VOGTS
ANDREW A. LOTHSON
SWANSON, MARTIN & BELL, LLP
330 NORTH WABASH, STE. 3300
CHICAGO, IL 60611
TEL: (312) 321-9100
FAX: (312) 321-0990
JVOGTS@SMBTRIALS.COM
ALOTHSON@SMBTRIALS.COM

JONATHAN P. WHITCOMB
SCOTT M. HARRINGTON
DISERIO MARTIN O'CONNOR & CASTIGLIONI LLP
ONE ATLANTIC STREET
STAMFORD, CT 06901
TEL: (203) 358-0800
FAX: (203) 348-2321
JWHITCOMB@DMOC.COM
SHARRINGTON@DMOC.COM

ATTORNEYS FOR REMINGTON ARMS CO., LLC AND REMINGTON OUTDOOR COMPANY, INC.

CHRISTOPHER RENZULLI
SCOTT C. ALLAN
RENZULLI LAW FIRM LLP
81 MAIN STREET, STE. 508
WHITE PLAINS, NY 10601
TEL: (914) 285-0700
FAX: (914) 285-1213
CRENZULLI@RENZULLILAW.COM
SALLAN@RENZULLILAW.COM

ATTORNEYS FOR CAMFOUR, INC. AND CAMFOUR HOLDING, INC.

PETER M. BERRY
BERRY LAW LLC
107 OLD WINDSOR ROAD,
2ND FLOOR
BLOOMFIELD, CT 06002
TEL: (860) 242-0800
FAX:
FIRM@BERRYLAWLLC.COM

ATTORNEY FOR RIVERVIEW SALES, INC. AND DAVID LAGUERCIA

TABLE OF CONTENTS FOR DEFENDANTS-APPELLEES' APPENDIX

Part One

Part Two

2015 WL 9598388
Only the Westlaw citation is currently available.

Superior Court of Connecticut,
Judicial District of Waterbury.

Nancy BEALE, Administratrix
for the Estate of Lindsey Beale
v.
Luis MARTINS et al.

No. UWYCV136020940S.
|
Dec. 1, 2015.

Attorneys and Law Firms

Faxon Law Group LLC, New Haven, for Nancy Beale.

Mulvey Oliver Gould & Crotta, Hamden, Sharp & Shields, Rocky Hill, Hassett & George PC, Simsbury, for Luis Martins et al.

BRAZZEL–MASSARO, J.

INTRODUCTION

***1** The action was filed by Nancy Beale, Administratrix of the Estate of Lindsey Beale. This is a wrongful death action as a result of an automobile accident in which Lindsey Beale was a passenger in the automobile driven by Luis Martins on June 8, 2013. The plaintiff named as defendants, Luis Martins, the driver of the motor vehicle, Jorge Martins, the father of Luis, Danbury Fair Hyundai, the dealership that sold the car and furnished the dealer plates, Adam Jarvis, the driver of the other vehicle and Eagle Electric Services, LLC., the employer of Adam and owner of the motor vehicle driven by him. The amended complaint consists of four counts. The first count alleges negligence against Jorge and Luis Martins and Danbury Fair Hyundai; the second count is a claim of recklessness as to Luis Martins; the third count is negligence as to Jarvis and Eagle Electric, LLC and the fourth count is a claim of negligent entrustment. The defendant Eagle Electric Services, LLC ("Eagle Electric") has filed this motion to strike Count Four of the May 7, 2015 amended complaint which added the claim of negligent entrustment to the action.[1] In this count, the plaintiff alleges that the defendant, Eagle Electric, negligently entrusted a vehicle to Adam Jarvis whose operation was illegal and in violation of the Fair Labor Standards Act. The defendant argues that the count fails to provide a legal and factual basis to support this count. The plaintiff contends that the defendant violated the Fair Labor Standards Act ("FLSA") because it permitted an employee under 17 years of age to drive the auto or truck on public roadways. The defendant counters that the plaintiff is not within the protected class intended by the statute and also that the plaintiff has failed to allege facts which would support a claim for negligent entrustment.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves,* 262 Conn. 480, 498, 815 A.2d 1188 (2003). Pursuant to Practice Book Section 10–39(a)(1), when a party seeks to contest the "legal sufficiency of the allegations of any complaint, counterclaim, or cross claim, or of any one or more counts thereof, to state a claim upon which relief can be granted, ... that party may do so by filing a motion to strike the contested pleading or part thereof." A motion to strike admits all well-pleaded facts. *Alarm Applications Co. v. Simsbury Volunteer Fire Co.,* 179 Conn. 541, 545, 427 A.2d 822 (1980). "The role of the trial court in ruling on a motion to strike is to examine the [complaint] construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Coe v. Board of Education,* 301 Conn. 112, 117, 19 A.3d 640 (2011). "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court ... Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted .) *Coppola Construction Co. v. Hoffman Enterprises Ltd. Partnership,* 309 Conn. 342, 350, 71 A3d 480 (2013).

***2** Count Four of the Amended Complaint states in part: "The crash and resultant injuries including death of Lindsey Beale were the direct and proximate result of the negligence of Eagle, in that it negligently entrusted a

vehicle to Adam Jarvis, whose operation was illegal and in violation of the Fair Labor Standards Act codified at 28 U.S.C. § 2201 et seq. and including violations of 29 U.S.C. § 29 U.S.C. § 213(c)(6) or C.F.R. § 670.52." The defendant argues that the allegations are deficient in two ways: 1) the plaintiff has not provided a legal basis that would support a claim that she is within the class protected by FLSA, that is for workers under the age of 17, and 2) the factual claims do not satisfy the criteria for a claim of negligent entrustment. In viewing the facts in the light most favorable to the plaintiff the pleadings do not support a claim for negligent entrustment as argued by the defendant.

The purpose of the statutory scheme under the FLSA was to protect the employees. The statute, section 202(a) provides that the act is to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The plaintiff is not a worker that would require the protections of the Act for her well-being or that of Lindsey Beale. The Act is to protect the employees and not the members of the public as the plaintiff attempts to argue. Therefore, the plaintiff is not within the protected class. Even if, the plaintiff was within the class she has failed to plead a factual basis for a claim of negligent entrustment. "[T]he essential elements of the tort of negligent entrustment of an automobile [are] that the entrustor knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought to reasonably anticipate the likelihood of injury to others by reason of that incompetence, and such incompetence does result in injury ... Liability cannot be imposed on a defendant under a theory of negligent entrustment simply because the defendant permitted another person to operate the motor vehicle ... Liability can only be imposed if (1) there is actual or constructive knowledge that the person to whom the automobile is loaned is incompetent to operate the motor vehicle and (2) the injury resulted from that incompetence ... The *Greeley* court, and its progeny recognized that a principal feature of a cause of action for negligent entrustment is the knowledge of the entrustor with respect to the dangerous propensities and incompetency of the entrustee." (Internal quotation marks omitted.) citing *Greeley v. Cunningham,* 116 Conn. 515, 520, 465 A. 678 (1933), *Morin v. Machrone,* Superior Court, judicial district of Litchfield, Docket No. CV 10–6003593 (May 20, 2011, Roche, J.). Count Four of the amended complaint does not include any allegations that the defendant had actual or constructive knowledge of the driver's alleged incompetence, which is the essential element of a cause of action for negligent entrustment. The age of the defendant is not in and of itself support for a claim of incompetence in the operation of the motor vehicle. Further, the complaint does not include any facts as to how the driver was incompetent other than a reference to the Fair Labor Standards Act. Without the key allegation of knowledge, the plaintiff has not sufficiently pled a claim for negligent entrustment.

***3** The motion to strike Count Four is granted.

All Citations

Not Reported in A.3d, 2015 WL 9598388, 61 Conn. L. Rptr. 389

Footnotes

1 The only defendant filing the motion is Eagle Electric Services, LLC and as such for purposes of the motion when the court refers to the defendant it is only as to Eagle Electric Services, LLC.

2016 WL 3176602
Only the Westlaw citation is currently available.
United States District Court,
D. Oregon.

Consumer Cellular, Incorporated, Plaintiff,
v.
ConsumerAffairs.com, Consumers Unified, LLC, and David Zachary Carman, Defendants.

3:15-CV-1908-PK
|
Signed February 29, 2016

Attorneys and Law Firms

Thomas R. Rask, III, Robert B. Lowry, Kell Alterman & Runstein, LLP, Portland, OR, for Plaintiff.

Cameron Stracher, New York, NY, Duane A. Bosworth, II, Timothy M. Cunningham, Davis Wright Tremaine, LLP, Portland, OR, for Defendants.

FINDINGS AND RECOMMENDATION

PAPAK, Magistrate Judge:

***1** Plaintiff Consumer Cellular, Inc. ("CCI"), filed this action against defendants ConsumerAffairs.com. Inc. ("ConsumerAffairs"), Consumers Unified, LLC ("Consumers Unified"), and David Zachary Carman in the Multnomah County Circuit Court on August 19, 2015. Defendants removed CCI's action to this court effective October 9, 2015, on the basis of both diversity and federal question jurisdiction.

CCI is a mobile virtual network operator providing cellphone service to its customers. ConsumerAffairs operates a consumer review website hosting consumer reviews regarding a large number of products and brands. Consumers Unified is a closely related affiliate of Consumer Affairs, and Carman is the principal of both corporate defendants. By and through its complaint as filed in the Multnomah County court, CCI alleges that defendants improperly manipulated the content and presentation of consumer reviews on the ConsumerAffairs website in order to provide a significant competitive advantage to product manufacturers and service providers who pay a large monthly fee to defendants, relative to manufacturers and providers who decline to pay such fees. Arising out of the foregoing, CCI alleges defendants' liability (i) for violation of Oregon's Unlawful Trade Practices Act (the "UTPA"), (ii) for intentional interference with prospective economic relations under Oregon common law, (iii) for conduct of or participation in an enterprise engaged in wire fraud and extortion in violation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), and (iv) for defamation under Oregon common law. CCI seeks monetary damages in the approximate amount of $5 million, equitable relief under the UTPA, treble damages under RICO, and award of its fees and costs. This court has federal-question jurisdiction over CCI's RICO claim pursuant to 28 U.S.C. § 1331 and may properly exercise supplemental jurisdiction over CCI's state-law claims pursuant to 28 U.S.C. § 1367; in addition, it is possible[1] that the court may properly exercise diversity jurisdiction over CCI's action pursuant to 28 U.S.C. § 1332(a) based on the (apparent) complete diversity of the parties and the amount in controversy.

Now before the court is defendants' special motion (#9) to strike, brought under Or Rev. Stat. 31.150 (Oregon's "anti-SLAPP" statute), by and through which defendants seek an order striking all of CCI's claims against them or, in the alternative, an order striking CCI's claims against Carman or, in the further alternative, an order dismissing CCI's RICO claim for failure to state a claim upon which relief can be granted. I have considered the motion, oral argument on behalf of the parties, and all of the pleadings and papers on file. For the reasons set forth below, defendants' motion should be denied in its entirety.

LEGAL STANDARD

I. Special Motion to Strike

***2** "Or. Rev. Stat. §§ 31.150–31.155 comprise Oregon's anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute[ ]. Anti-SLAPP statutes are designed to allow the early dismissal of meritless lawsuits aimed at chilling expression through costly, time-consuming litigation." *In re Gardner*, 563 F.3d 981, 986 (9th Cir. 2009), *citing Verizon Delaware, Inc. v. Covad Comms. Co.*, 377 F.3d 1081, 1090 (9th Cir. 2004).

> Section 31.150 allows defendants to bring a special motion to strike a claim which shall be treated as a

> motion to dismiss under Or. R. Civ. P. 21 A and requires the court to enter a "judgment of dismissal without prejudice" if the motion is granted. **The court's consideration of a special motion to strike is a two-step process. First, the defendant has the initial burden to show that the challenged statement is within one of the categories of civil actions described in Or. Rev. Stat. § 31.150(2). If the defendant meets the initial burden, "the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case.** If the plaintiff meets this burden, the court shall deny the motion." Or. Rev. Stat. § 31.150(3).

In re Gardner, 563 F.3d at 986 (emphasis supplied; footnote omitted).

In evaluating special motions to strike under Section 31.150, the Oregon courts consider "the facts underlying plaintiffs' claims in the light most favorable to plaintiffs," *Neumann v. Liles*, 261 Or. App. 567, 570 n. 2 (2014), and do not weigh the evidence or make any determination of the likelihood that plaintiffs will ultimately prevail, *citing Young v. Davis*, 259 Or. App. 497, 508 (2013). Each of the two steps of the process—the defendant's burden to show that the challenged statement is within the scope of the anti-SLAPP statute and the plaintiff's burden to establish "a probability" that the claims will prevail "by presenting substantial evidence to support a *prima facie* case"—presents a question of law. *Id.* at 572, *citing Young*, 259 Or. App. at 507-510. Section 31.150 is intended to create and does create a "low bar" for plaintiffs to overcome, and is intended only "to weed out meritless claims meant to harass or intimidate—not to require that a plaintiff prove its case before being allowed to proceed further." *Young*, 259 Or. App. at 508, *citing Staten v. Steel*, 222 Or. App. 17, 32 (2008) ("The purpose of the special motion to strike procedure ... is to expeditiously terminate *unfounded* claims that threaten constitutional free speech rights, not to deprive litigants of the benefit of a jury determination that a claim is *meritorious*" (emphasis original)). A plaintiff meets its burden under Section 31.150 by submitting evidence that, if credited, "would permit a reasonable factfinder" to rule in the plaintiff's favor. *Neumann*, 261 Or. App. at 575; *see also Young*, 259 Or. App. at 508 ("the presentation of substantial evidence to support a *prima facie* case is, *in and of itself*, sufficient to establish a probability that the plaintiff will prevail; whether or not it is 'likely' that the plaintiff will prevail is irrelevant in determining whether it has met the burden of proof set forth by ORS 31.150(3)" (emphasis original)). As necessarily follows from the foregoing, the fact that the defendant may present substantial evidence to the contrary is likewise irrelevant to determining whether the plaintiff has met his burden. *See Young*, 259 Or. App. at 510.

***3** The Oregon courts "look to California case law [in construing Section 31.150 *et seq.*] because Oregon's anti-SLAPP statute was 'modeled on California statutes' and '[i]t was intended that California case law would inform Oregon courts regarding the application of ORS 31.150 to ORS 31.155.' " *Neumann*, 2014 Ore. App. LEXIS 296, *9 n. 3, *quoting Page v. Parsons*, 249 Or. App. 445, 461 (2012).

II. Motion to Dismiss for Failure to State a Claim

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action;" specifically, it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To raise a right to relief above the speculative level, "[t]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id., quoting* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004); *see also* Fed. R. Civ. P. 8(a). Instead, the plaintiff must plead affirmative factual content, as opposed to any merely conclusory recitation that the elements of a claim have been satisfied, that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Twombly*, 550 U.S. at 556. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009), *citing Iqbal*, 556 U.S. at 678.

"In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). In considering a motion to dismiss, this court accepts all of the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *See Kahle v. Gonzales*, 474 F.3d

665, 667 (9th Cir. 2007). Moreover, the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256 (1994), *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court need not, however, accept legal conclusions "cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

MATERIAL FACTS

I. The Parties

Plaintiff CCI is a mobile virtual network operator providing cellphone service to its customers. CCI is headquartered in Oregon and organized under Oregon law.

Defendant Consumer Affairs operates a website hosting consumer reviews of a variety of products, brands, and services. ConsumerAffairs is organized under Nevada law and appears to be headquartered in Oklahoma. Defendant Consumers Unified is a closely related affiliate of ConsumerAffairs, is organized under Nevada law, and apparently has members who are citizens of California, Colorado, Delaware, Florida, Massachusetts, Nevada, New Mexico, Oklahoma, and Virginia. Defendant Carman is the principal of both corporate defendants, and is a citizen of Oklahoma.

II. History Underlying the Parties' Dispute [2]

***4** ConsumerAffairs has been in existence since 1998. Carman acquired ConsumerAffairs in 2010, at which time he modified its business model in order to earn increased revenue by inducing manufacturers and providers whose products and services were reviewed on the ConsumerAffairs website to pay fees to become accredited members entitled to preferential treatment in the display and use of consumer ratings. Specifically, (i) ConsumerAffairs conspicuously characterizes customer reviews of the products and services offered by paying accredited members as "Reviews and Complaints" whereas it equally conspicuously characterizes the reviews of other entities' products and services as "Complaints and Reviews," (ii) Consumer-Affairs permits accredited members to challenge or otherwise respond to negative reviews, eliminating such reviews where members assert that the complaints are not based in fact or where the consumer who originally posted the negative review fails to rebut the members' response, whereas other entities are not given any opportunity to challenge or respond to negative reviews, (iii) the pages dedicated to reviews of non-accredited members' products and services all include a section containing the text "Not Impressed With [the entity whose products or services are under review]? Find a company you can trust," followed by a link to "Top Alternatives" headed by an accredited member, whereas the pages dedicated to reviews of accredited members contain no such sections, and (iv) reviews are presented in reverse chronological order on the pages dedicated to review of non-accredited members' products and services, whereas positive reviews are moved to the top of the display of reviews of accredited members' products and services.

On August 19, 2014, Andrew Polacek, a sales executive at ConsumerAffairs, began a series of email solicitations directed to Brian Hepner, a marketing executive at CCI. Polacek's first email message indicated that the ConsumerAffairs page dedicated to hosting reviews of CCI's products had been viewed 14,000 times during the previous 30 days, and that the page hosted "149 reviews and complaints that have not been addressed by [CCI]," with the stated consequence that CCI's "brand [wa]s currently being defined on the page by detractors in a highly visible way." Polacek offered to help CCI "turn[ ] the page positive and transform[ ] it into a positive branding message." Hepner did not respond to Polacek's initial message.

Polacek sent Hepner further similar messages on September 2 and September 9, 2014. On September 12, 2014, CCI digital marketing manager Dominic Artero agreed to speak with Polacek on September 16, 2014.

On September 16, 2014, Polacek explained to Artero that ConsumerAffairs could erase or raise negative ratings by permitting CCI to challenge or otherwise respond to such ratings, and could additionally affirmatively solicit positive reviews of CCI's services.

On October 7, 2014, Polacek emailed Artero to assert that the ConsumerAffairs page dedicated to reviews of CCI had been viewed more that 18,000 times in the previous 30 days. On October 10, 2014, Polacek emailed Artero a PowerPoint presentation advising that Google searches for "Consumer Cellular" or for "Consumer

Cellular reviews" yielded ConsumerAffairs' CCI page as either the third or fourth result, and that the page currently rated CCI overall with two out of five possible stars. The presentation indicated that the 2/5 rating could be increased to a "strong positive" in exchange for a $15,000 "setup" fee and a recurring $5,000 monthly fee thereafter. The presentation indicated that such a change could immediately yield "$7,200 a month in customer lifetime revenue" and that "once we've turned the pages around to being net positive" that amount could be expected to increase by a factor of ten. The presentation indicated that these numbers were based on "a low [then-current estimated] conversion rate [*i.e.*, the percentage of customers viewing reviews who ultimately enter into a business relationship with the entity whose services are being reviewed] ... [of] 2%," [3] and the presumption that the "conversion rates of leads and sales are typically much higher than that once [defendants had] turned the pages around to being net positive [*i.e.*, after the entity at issue became an accredited member] (more like 10% and 20%, respectively)."

In or around late October or early November 2014, CCI CEO John Marick declined to do business with defendants. On November 18, 2014, Polacek emailed Marick directly, inquiring as to why Marick would decline an arrangement that would "pay for ... itself and then some" from its inception. Polacek included as attachments to his message computer screenshots indicating that the ConsumerAffairs CCI page had been viewed nearly 24,000 times in the previous 30 days, and that CCI had a then-shrinking 1.5/5 star rating.

***5** In December 2014, ConsumerAffairs produced an article summarizing its hosted consumer reviews of CCI's services and linking to one extremely positive review. At approximately that same time, CCI received positive feedback from a CCI customer. CCI encouraged the customer to submit a review to ConsumerAffairs, and the customer replied that he had already submitted a positive review to that website. ConsumerAffairs did not post the review. CCI believes that other, similarly situated customers submitted positive reviews to ConsumerAffairs following Marick's refusal to do business with the defendants that were not ultimately posted.

On February 18, 2015, Polacek emailed Hepner indicating that Google searches for "Consumer Cellular" then yielded ConsumerAffairs' CCI page as the second result and that Google searches for "Consumer Cellular reviews" yielded ConsumerAffairs' CCI page as the top result, that CCI had an overall rating of 1.5 stars on the ConsumerAffairs CCI page, and that the page had been viewed 22,000 times in the previous 30 days.

At some time thereafter, the link in the article of December 2014 was redirected from the positive review of CCI's services to the ConsumerAffairs CCI "Complaints and Reviews" page.

Between October 26, 2013, and April 15, 2014, defendants posted at least eight 5-star reviews of CCI's services that had been submitted by CCI customers. Between April 15 and August 19, 2014, defendants posted only one positive review of CCI's services, specifically a 4-star review. During the period when defendants were soliciting CCI's business, defendants posted two positive reviews of CCI's services, one a 5-star and one a 4-star review. Between October 1, 2014, and August 19, 2015, when this action was filed, defendants posted one single positive review of CCI's services (a 5-star review) and deleted from its website a formerly negative review that had been revised by the original reviewer to become a positive 5-star review. The largely negative reviews on the ConsumerAffairs CCI page are anomalous by comparison with reviews of CCI's services appearing on other sites, including those of the Better Business Bureau, Prepaid Reviews, CNET, Yelp, and Pissedconsumer.com.

ConsumerAffairs hosts reviews of 40 cellphone service providers, only one of which is an accredited member. That accredited member has nearly a perfect 5-star rating on the Consumer Affairs website, whereas none of the other 39 providers whose services are reviewed on ConsumerAffairs.com has as high as a 2-star rating. Prior to that entity becoming an accredited member, it had virtually no positive reviews on the ConsumerAffairs website.

ANALYSIS

I. Defendants' Special Motion to Strike

Oregon's Anti-SLAPP statute specifically provides as follows:

> (1) A defendant may make a special motion to strike against a claim in a civil action described in

subsection (2) of this section. **The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim.** The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice. If the court denies a special motion to strike, the court shall enter a limited judgment denying the motion.

(2) **A special motion to strike may be made under this section against any claim in a civil action that arises out of:**

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

***6** (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

(c) **Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or**

(d) **Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.**

(3) **A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case.** If the plaintiff meets this burden, the court shall deny the motion.

(4) **In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.**

(5) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim:

(a) The fact that the determination has been made and the substance of the determination may not be admitted in evidence at any later stage of the case; and

(b) The determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

Or. Rev. Stat. 31.150 (emphasis supplied). [4]

CCI argues, first, that defendants' motion should be summarily denied because the anti-SLAPP statute is a creature of state law (which it is), because the Federal Rules of Civil Procedure do not provide any equivalent mechanism for early dismissal of meritless lawsuits intended to chill the exercise of free speech rights (which they do not), and because the anti-SLAPP statute is—purportedly—strictly procedural rather than substantive, and therefore outside the purview of the federal courts to enforce (*see, e.g.*, *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (federal courts sitting in diversity or exercising supplemental jurisdiction over state-law claims generally apply state substantive law and federal procedural law) (citations omitted)). It is true that there is a significant procedural component to Oregon's anti-SLAPP statute, *see* Or. Rev. Stat. 31.155(2) ("ORS 31.150 and 31.152 create a procedure for seeking dismissal of claims described in ORS 31.150 (2) and do not affect the substantive law governing those claims"), but nothing in the statute or its legislative history suggests that the statute lacks any substantive component whatsoever. Moreover, it is well established that, when sitting in diversity or exercising supplemental jurisdiction over state-law claims, "federal courts ... must give full effect to state procedural rules when those rules are 'intimately bound up with the state's substantive decision making' or 'serve substantive slate policies,'" *Cnty. of Orange v. United States Dist. Court*, 784 F.3d 520, 530 (9th Cir. 2015), *quoting Feldman v. Allstate Insurance Co.*, 322 F.3d 660 (9th Cir. 2003), and in any event the Ninth Circuit has repeatedly held that, in the absence of any conflict between federal procedural law and a state-enacted anti-SLAPP

statute, such statutes should be applied and enforced in the federal courts, *see, e.g.*, *United States* ex rel. *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-973 (9th Cir. 1999), including Oregon's anti-SLAPP statute, *see Northon v. Rule*, 637 F.3d 937, 938-939 (9th Cir. 2011), *Englert v. MacDonell*, 551 F.3d 1099, 1101-1102 (9th Cir. 2009). I therefore reject CCI's argument for summary denial of defendants' special motion to strike as contrary to applicable law. [5]

***7** In the alternative to its argument for wholesale summary denial of defendants' special motion, CCI argues as a preliminary matter that its RICO claim, as a cause of action arising under federal law, is necessarily outside the scope of Oregon'a anti-SLAPP statute. I agree with CCI that state anti-SLAPP statutes are as a matter of law necessarily inapplicable to federal causes of action. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010). Defendants' special motion to strike should therefore be summarily denied (*qua* motion to strike) as to CCI's RICO cause of action. However, where, as here, the claimant has availed itself of the opportunity to submit briefing in support of the proposition that its at-issue claim is well pled, the courts of the Ninth Circuit may appropriately consider *sua sponte* whether such a claim is subject to dismissal under Federal Civil Procedure Rule 12(b)(6), *see Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 335-336 (9th Cir. 2015), and this court may therefore appropriately construe defendants' motion as a Rule 12(b)(6) motion to dismiss to the extent it addresses CCI's RICO claim, *see LaHodny v. 48 Hours*, Case No. 6:13-CV-2102-TC, 2015 U.S. Dist. LEXIS 38447, *14 (D. Or. Feb. 17, 2015). I recommend that this court so construe defendants' special motion to strike as it applies to CCI's RICO claim, and I analyze the motion so construed below.

A. Defendants' Burden to Establish that CCI's State-Law Claims are within the Scope of the Anti-SLAPP Statute

As noted above, CCI brings three state-law claims, one for violation of Oregon's UTPA, one for intentional interference with prospective economic relations under Oregon common law, and one for defamation under Oregon common law. As to CCI's first state-law claim, the UTPA provides that "a person that suffers an ascertainable loss of money or property, real or personal, as a result of another person's willful use or employment of a method, act or practice declared unlawful under ORS 646.608, may bring an individual action in an appropriate court to recover actual damages or statutory damages of $200, whichever is greater." Or. Rev. Stat. 646.638(1). Or. Rev. Stat. 646.608, in relevant part, provides that:

> A person engages in an unlawful practice if in the course of the person's business, vocation or occupation the person does any of the following:
>
> * * *
>
> (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.
>
> * * *
>
> (e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.
>
> * * *
>
> (h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.

Or. Rev. Stat. 646.606(1). It is CCI's position that defendants violated the UTPA by curating and presenting consumer reviews on its website in a manner calculated to cause a likelihood of confusion regarding approval of its services and to disparage CCI's services misleadingly.

As to CCI's second state-law claim, under Oregon law:

> To state a claim for intentional interference with economic relations, a plaintiff must allege: (1) the existence of a professional or business relationship; (2) intentional interference with that relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and

damage to the economic relations; and (6) damages.

Northwest Natural Gas Co. v. Chase Gardens, Inc., 328 Or. 487, 498 (1999), *citing McGanty v. Standenraus*, 321 Or. 532, 535 (1995). The requisite "professional or business relationship" may be purely prospective in nature. *See Cron v. Zimmer*, 255 Or. App. 114, 125 (2013), *quoting McGanty*, 321 Or. at 535. "Generally, commercial and contractual relationships enjoy the protection of the tort." *Id., citing Allen v. Hall*, 328 Or. 276, 281 (1999). "However, a defendant can be liable for interference 'even though the arrangement interfered with does not rise to the dignity of a contract.' " *Id., quoting Luisi v. Bank of Commerce*, 252 Or. 271, 275 (1969). "Liability for intentional interference with prospective business advantage ... arises when the defendant, without a privilege to do so, induces a third person not to enter into or to continue a business relationship with the plaintiff." *Thompson v. Telephone & Data Sys.*, 130 Or. App. 302, 313 (1994); *citing Top Service Body Shop v. Allstate Ins. Co.*, 283 Or. 201, 206 (1978). It is CCI's position that defendants intentionally interfered with its prospective business relationships with consumers affirmatively seeking reviews of its services on defendants' webpages by curating and presenting those reviews in a manner calculated to cause viewers to avoid doing business with CCI.

***8** As to CCI's third state-law claim, under Oregon law, "[t]he elements of a claim for defamation are: (1) the making of a defamatory statement; (2) publication of the defamatory material; and (3) a resulting special harm, unless the statement is defamatory *per se* and therefore gives rise to presumptive special harm." *Nat'l Union Fire Ins. Co. v. Starplex Corp.*, 220 Or. App. 560, 584 (2008), *citing L & D of Or. v. Am. States Ins. Co.*, 171 Or. App. 17, 22 (2000). "A defamatory statement is one that would subject another to hatred, contempt or ridicule or tend to diminish the esteem, respect, goodwill or confidence in which the other is held or to excite adverse, derogatory or unpleasant feelings or opinions against the other." *Id.* (internal modifications omitted), *quoting Marleau v. Truck Ins. Exch.*, 333 Or. 82, 94 (2001). It is CCI's position that its business was harmed by defendants' curation and presentation of reviews in a manner calculated to disparage CCI's services.

In light of the foregoing, defendants take the position that CCI's state-law claims arise out of one or both of the categories of cases listed under Or. Rev. Stat. 31.150(2)(c) and/or (d), namely:

> (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Or. Rev. Stat. 31.150(2). CCI counters that its state-law claims do not arise out of statements constituting expressions of free speech, but rather out of bad-faith removal or concealment of positive reviews and out of deceitful and manipulative nondisclosure of information material to interpretation of published expressions of free speech. That is, CCI characterizes the conduct out of which its claims arise as calculated to inhibit rather than to further constitutional free speech rights, and on that basis argues that its state-law claims are outside the scope of the anti-SLAPP statute.

Assuming *arguendo* that CCI is correct that the complained-of conduct cannot constitute the making of a written statement or the presentation of a document, I find that all of the complained-of conduct would nevertheless fall within the scope of Section 31.150(2)(d). First, it appears clear that hosting a consumer reviews website accessible to the public constitutes a public issue or issue of public interest for purposes of Oregon's anti-SLAPP statute. *See, e.g.*, *Gardner v. Martino*, Case No. CV-05-769-HU, 2005 U.S. Dist. LEXIS 38970, *13-20 (D. Or. Sept. 19, 2005) (so finding on the basis of collected material Oregon and California cases). Second, there can be no serious argument that the expression of opinion regarding the quality of services provided to the public is not conduct in furtherance of the exercise of the constitutional right to free speech. Third, defendants' complained-of actions—removing positive reviews, increasing the salience of negative reviews, etc.—constitute elections made in the course of editing, curating, and presenting the consumer reviews submitted to the Consumer Affairs website. As such, that conduct, too, is necessarily conduct in furtherance of the exercise of the constitutional right to free speech for purposes of the anti-SLAPP statute, I therefore find that defendants have met their burden to establish that CCI's state-law claims are

within the scope of Section 31.150(2). In consequence, the burden shifts to CCI to establish a probability of success on the merits as to each of its state-law claims.

B. CCI's Burden to Establish a Probability of Success on the Merits as to Each of its State-Law Claims

1. CCI's Burden to Establish a Probability of Success on the Merits as to its UTPA Claim

***9** As noted above, the UTPA provides that "a person that suffers an ascertainable loss of money or property, real or personal, as a result of another person's willful use or employment of a method, act or practice declared unlawful under ORS 646.608, may bring an individual action in an appropriate court to recover actual damages or statutory damages of $200, whichever is greater." Or. Rev. Stat. 646.638(1). Or. Rev. Stat. 646.608, in relevant part, provides that:

> A person engages in an unlawful practice if in the course of the person's business, vocation or occupation the person does any of the following:
>
> * * *
>
> (b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.
>
> * * *
>
> (e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that the person does not have.
>
> * * *
>
> (h) Disparages the real estate, goods, services, property or business of a customer or another by false or misleading representations of fact.

Or. Rev. Stat. 646.606(1).

Although it does not appear that the Oregon courts have addressed the question, the courts of this district have persuasively interpreted the legislative history of the UTPA as providing a cause of action only to consumers, and not to business rivals. *See, e.g.*, *Benson Tower Condo. Owners Ass'n v. Victaulic Co.*, 22 F. Supp. 3d. 1126, 1135-1137 (D. Or. 2014) (and cases discussed therein). Defendants argue that CCI is not a consumer but rather a provider of services to consumers, and on that basis argue that CCI cannot establish a probability of success on the merits of its UTPA claim.

I agree with the defendants that the legislative history of the UTPA leaves little room for the conclusion that a non-consumer may bring a private cause of action under the statute. *See Denson v. Ron Tonkin Gran Turismo, Inc.*, 279 Or. 85, 90 (1977) (discussing the legislative history of the UTPA and concluding that it was not intended to protect competitors but rather to protect only consumers); *Lund v. Arbonne Int'l, Inc.*, 132 Ore. App. 87, 93 n.7, 887 P.2d 817, 822 n.7 (1994) (discussing legislative history of the UTPA indicating that victims of unlawful trade practices other than consumers are "excluded" from the protections of the statute); *see also CollegeNET, Inc. v. Embark.com, Inc.*, 230 F. Supp. 2d 1167, 1173-1175 (D. Or. 2000) (discussing legislative history). However, it is by no means clear that CCI is not, as defendants contend, a consumer for purposes of the statute. I note in this connection that a corporate entity can constitute a "person that suffers an ascertainable loss of money or property" for purposes of Section 646.638(1), *see* Or. Rev. Stat. § 646.605(4), such that there can be no argument that CCI is barred from bringing a UTPA claim on sole the basis of its status as a corporate entity engaged in business. *See, e.g.*, *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 129 Or. App. 206, 217 (1994).

Furthermore, CCI is in no sense a competitor or a business rival of defendants. As discussed above, CCI is a mobile virtual network operator in the business of providing cellphone services; defendants own and operate a consumer review website. CCI's revenue comes from consumers who purchase their cellphone services, whereas defendants earn revenue from two different classes of consumers: purchasers of advertising space on defendants' website, and purchasers of memberships in defendants' accreditation program.

***10** Moreover, as discussed above CCI expressly alleges that defendants repeatedly and persistently solicited CCI to become a purchaser of the services defendants offer

to their accredited members, namely rating-improvement services. Defendants' alleged solicitations establish for purposes of this stage of these proceedings that CCI was squarely within the class of potential consumers of defendants' membership services.

Finally, it is clear that the Oregon courts do not require that a UTPA plaintiff have actually purchased the defendant's products or services or otherwise have entered into privity with the defendant, but rather require only that the plaintiff be a consumer damaged by the defendant's unlawful conduct. *See, e.g.*, *Raudebaugh v. Action Pest Control, Inc.*, 59 Ore. App. 166, 171-172 (1982) (finding that plaintiffs who were harmed by a business entity's misrepresentations had statutory standing to bring a UTPA claim despite not having purchased any products or services from the defendant and despite the fact that the defendant had no knowledge that its misrepresentations would be communicated to the plaintiffs at the time they were made). As a potential consumer of defendants' services allegedly harmed by defendants' complained-of unlawful conduct, under Oregon law the requirement that a UTPA plaintiff be a "consumer" rather than a business rival presents no bar to CCI's UTPA claim.

For its part, CCI has adduced evidence on the basis of which, if viewed in the light most favorable to CCI, a finder of fact could reasonably conclude that defendants manipulated the consumer reviews hosted on its page in a manner calculated to create a more negative impression of CCI's services than would have been the case had the reviews been unmanipulated. *See* Declaration of Robert B. Lowry ("Lowry Decl.") (and exhibits attached thereto); Declaration of John S. Marick ("Marick Decl.") (and exhibits attached thereto); Declaration of Nancy S. Koppy ("Koppy Decl.") (and exhibits attached thereto). In addition, CCI has adduced evidence on the basis of which, if viewed in the light most favorable to CCI, a finder of fact could reasonably conclude that CCI suffered ascertainable losses as a consequence of such manipulations. *See* Marick Decl. ¶ 9 (and associated exhibits attached thereto). I therefore find that CCI has met its burden to establish a probability of success on the merits of its UTPA claim. Defendants' special motion to strike should therefore be denied as to that claim.

2. CCI's Burden to Establish a Probability of Success on the Merits as to its Intentional Interference Claim

As noted above, under Oregon law:

> To state a claim for intentional interference with economic relations, a plaintiff must allege: (1) the existence of a professional or business relationship; (2) intentional interference with that relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and damage to the economic relations; and (6) damages.

Northwest Natural Gas, 328 Or. at 498, *citing McGanty*, 321 Or. at 535. The requisite "professional or business relationship" may be purely prospective in nature. *See Cron*, 255 Or. App. at 125, *quoting McGanty v. Staudenraus*, 321 Or. 532, 535 (1995). "Generally, commercial and contractual relationships enjoy the protection of the tort." *Id., citing Allen v. Hall*, 328 Or. 276, 281 (1999). "However, a defendant can be liable for interference 'even though the arrangement interfered with does not rise to the dignity of a contract.' " *Id., quoting Luisi*, 252 Or. at 275. "Liability for intentional interference with prospective business advantage ... arises when the defendant, without a privilege to do so, induces a third person not to enter into or to continue a business relationship with the plaintiff." *Thompson*, 130 Or. App. at 313; *citing Top Service*, 283 Or. at 206.

***11** Moreover, "[d]eliberate interference alone does not give rise to tort liability." *Cron*, 255 Or. App. at 125; *see also Top Service*, 283 Or. at 209-210 ("[A] claim [of tort liability for intentional interference with contractual or other economic relations] is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.").

The *Northwest Natural Gas* court specified that:

> To be entitled to reach a jury, a plaintiff must not only prove that defendant intentionally interfered with [its] business relationship but also that defendant had a duty of non-interference; *i.e.*, that [it] interfered for an improper purpose rather than for a legitimate one, or that defendant used improper means which resulted in injury to plaintiff. Therefore, a case is made out which entitles plaintiff to go to a jury only when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself.

Northwest Natural Gas, 328 Or. at 498 (citations, internal quotation marks omitted).

It is defendants' position that CCI cannot establish a probability of prevailing on the merits of its intentional interference claim because it had no existing contractual relationship or any non-speculative prospective economic relationship with members of the public who viewed reviews of CCI's services on defendants' website, and because, in the absence of any such existing or affirmatively prospective relationship, it cannot show that defendants' purported interference with such relationships could have been intentional. CCI counters that its prospective business relationships with members of the public affirmatively seeking out reviews of its services were more than merely speculative and at all material times were known by defendants, in part because as a matter of logic either all or nearly all such persons can be expected to have been affirmatively considering entering into a business relationship with CCI at the time they visited defendants' website, and in part because of evidence tending to establish that a small but determinable percentage of persons who seek out information regarding CCI's services can be predicted as a matter of statistics to make the ultimate decision to do business with CCI.

The Oregon case law does not provide significant guidance as to what sorts of "arrangements" between parties that do not "rise to the dignity of a contract" can constitute a prospective economic relationship for purposes of the tort. While it is well settled that the requisite "professional or business relationship [may constitute], *e.g.*, ... a prospective economic advantage," *McGanty*, 321 Or. at 535, the cases do not establish guidelines for distinguishing purely speculative potential economic relations with member of the public generally from cognizable prospective relationships that can be identified with adequate certainty notwithstanding the absence of any enforceable business agreement, but rather establish only that interference with a potential economic advantage may be actionable where the defendant "know [s] of the plaintiff's prospective relationship and intentionally interfere[s] with that relationship" via improper means or purpose, to the plaintiff's ascertainable harm. *United Employer Benefit Corp. v. Department of Ins. & Fin.*, 133 Or. App. 477, 487 (1995), *citing Glubka v. Long*, 115 Or. App. 236, 239 (1992). In *United Employer*, the court of appeals affirmed the decision of the trial court below to direct verdict in favor of an intentional interference defendant on the ground that the defendant's interference was accomplished neither through improper means nor for any improper purpose, but apparently considered the other elements of the tort to have been satisfied by evidence that the defendant had knowledge of the plaintiff's intent to solicit potential customers whose names appeared on a list, a substantial proportion of whom had had no prior contact with the plaintiff, that despite such knowledge the defendant intentionally interfered with the plaintiff's ability to solicit the customers, and that the plaintiff was damaged in its business in consequence. *See id.* at 484, 487. It thus appears that, under Oregon law, a third party's conduct in intentionally inducing a person not to enter into a business relationship with another may be actionable where the prospect that the possible business relationship would be consummated was sufficiently cognizable that the third party could be aware that such prospect existed. *See id.*; *see also Top Service*, 283 Or. at 206.

***12** The record herein contains evidence on the basis of which a finder of fact could reasonably conclude that such a prospect of economic relations between CCI and persons searching for reviews of CCI's services existed, and that defendants were aware of it at the material times. Specifically, the record contains both Marick's declaration testimony that an ascertainable percentage of members of the public who choose to access CCI's website ultimately elect to do business with CCI, *see* Marick Decl. ¶ 9, and evidence that defendants, by and through their employee Polacek, admitted to CCI that they were able to ascertain as a matter of statistics

both the percentage of persons affirmatively searching for consumer reviews of CCI's services who ultimately elected to do business with CCI and the expected increase in that percentage should CCI become an accredited member of ConsumerAffairs, *see* Declaration of Brian E. Hepner ("Hepner Decl.") (and exhibits attached thereto), Marick Decl. Exh. 1. In addition, as noted above, CCI has adduced evidence on the basis of which a finder of fact could reasonably conclude that defendants intentionally and improperly manipulated the consumer reviews hosted on its page in a manner calculated to create a more negative impression of CCI's services than would have been the case had the reviews been unmanipulated, *see* Lowry Decl. (and exhibits attached thereto), Marick Decl. (and exhibits attached thereto), Koppy Decl. (and exhibits attached thereto), as well as evidence on the basis of which a finder of fact could reasonably conclude that CCI suffered ascertainable losses as a consequence of such manipulations, *see* Marick Decl. ¶ 9 (and associated exhibits attached thereto). On the basis of that evidence, I find that CCI has met its burden to establish a probability of success on the merits of its intentional interference claim. Defendants' special motion to strike should therefore be denied as to that claim.

3. CCI's Burden to Establish a Probability of Success on the Merits as to its Defamation Claim

As noted above, under Oregon law, "[t]he elements of a claim for defamation are: (1) the making of a defamatory statement; (2) publication of the defamatory material; and (3) a resulting special harm, unless the statement is defamatory *per se* and therefore gives rise to presumptive special harm." *Nat'l Union*, 220 Or. App. at 584, *citing L & D*, 171 Or. App. at 22. "A defamatory statement is one that would subject another to hatred, contempt or ridicule or tend to diminish the esteem, respect, goodwill or confidence in which the other is held or to excite adverse, derogatory or unpleasant feelings or opinions against the other." *Id.* (internal modifications omitted), *quoting Marleau*, 333 Or. at 94. Defendants take the position that CCI cannot establish a probability of success on the merits of its defamation claims because the statements regarding CCI's services that appear on its website are statements of opinion, and as a matter of law statements of opinion cannot be defamatory. Defendants additionally argue that any defamatory statements made in the consumer reviews published on its website are attributable solely to the authors of the reviews pursuant to the federal Communications Decency Act, and cannot be actionable against the defendants.

I agree with defendants that, as a general rule, "expressions of opinion ... which cannot be interpreted reasonably as stating actual facts, are not actionable [as defamation] because they are constitutionally protected." *Reesman v. Highfill*, 327 Or. 597, 606 (1998), *citing Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Here, however, CCI's defamation claim is not premised on the opinions expressed by the consumers whose reviews are hosted on defendants' webpages, but rather on defendants' own affirmative statements, primarily—perhaps exclusively—defendants' statements regarding the aggregate "overall satisfaction rating" that it calculates on the basis of all of the reviews of CCI's services hosted on its site, and presents in salient fashion on the same page as the reviews themselves. It is CCI's position that defendants' own statement that the "overall satisfaction rating" of CCI's services was (for example) 1.5 out of a possible 5 stars was defamatory; specifically, it is CCI's position that defendants made and published the statement, that the statement tended to diminish the confidence of the public in the quality of CCI's services, that it was damaged in its business by the defamatory character of the statement, and that defendants knew the statement was false when they published it, in that defendants knowingly failed to include positive reviews in their calculation of the rating. CCI has proffered evidence from which a finder of fact could reasonably conclude that each of those propositions is accurate. *See* Lowry Decl. (and exhibits attached thereto); Marick Decl. (and exhibits attached thereto); Koppy Decl. (and exhibits attached thereto); Hepner Decl. (and exhibits attached thereto).

***13** Moreover, because the statement(s) actually at issue are not those of third parties to this action that are merely hosted and curated by the defendants but rather the defendants' own factual representation(s) regarding those third-party expressions of opinion, the immunity provision of the Communications Decency Act, which provides only that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," is entirely inapplicable to CCI's defamation claim to the extent so premised. 47 U.S.C. § 230(c)(1).

For the foregoing reasons, CCI has met its burden to establish a probability of success on the merits of its defamation claim. Defendants' special motion to strike should therefore be denied as to that claim.

4. CCI's Burden to Establish a Probability of Success on the Merits as to its State-Law Claims to the Extent Alleged against Carman

Defendants argue, in the alternative to their arguments in favor of striking all of CCI's state-law claims in their entirety, that CCI's state-law claims should be stricken to the extent alleged against Carman, the principal of both corporate defendants. In support of that argument, defendants assert that CCI failed to allege Carman's direct involvement in any of the complained-of conduct.

Notwithstanding defendants' assertion, CCI in fact alleged that Carman "established a new business model" for the Consumer Affairs business, specifically the business model complained of herein pursuant to which defendants allegedly manipulate the presentation of consumer reviews and suppress positive reviews in order to create a less favorable than warranted impression of the products and services of entities that decline to become accredited members of defendants' scheme. Complaint, ¶¶ 3, 11. More critically, CCI has adduced evidence on the basis of which a finder of fact could reasonably conclude that Carman directed the corporate entities to engage in the allegedly tortious conduct described in CCI's complaint. *See* Declaration of Mike Strain ("Strain Decl."), Exh. 1. Under Oregon law, an officer or director of a corporate entity will be liable for tortious conduct the officer or director affirmatively directs the corporate entity to engage in. *See Cortez v. Nacco Material Handling Group, Inc.*, 356 Or. 254, 270 (2014); *see also Lewis v. Devils Lake Rock Crushing Co.*, 274 Or. 293, 298 (1976); *Pelton v. Gold Hill Canal Co.*, 72 Or. 353, 357-358 (1914). It follows that CCI has met its burden to establish a probability of success on the merits of its state-law claims to the extent alleged against Carman, and that defendants' special motion to strike should be denied to the extent it addresses CCI's claims as alleged against Carman specifically. [6]

II. Defendants' Constructive Motion to Dismiss CCI's RICO Claim

***14** As noted above—and as defendants concede by and through their reply memorandum—CCI's federal RICO claim is necessarily outside the scope of defendants' special motion to strike. Also as noted above, it is appropriate (where, as here, the nonmoving party has had an opportunity to submit briefing defending the adequacy of its allegations to support the federal claim) to treat a special motion to strike a federal claim as a motion to dismiss arising under Federal Civil Procedure Rule 12(b). *See Seismic Reservoir*, 785 F.3d at 335-336; *LaHodny*, 2015 U.S. Dist. LEXIS 38447 at *14.

The federal RICO Act provides a civil action for "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). 18 U.S.C. § 1962(a) through (c) "prohibit certain 'patterns of racketeering activity' in relation to an 'enterprise.' " *United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't*, 770 F.3d 834, 837 (9th Cir. 2014) (internal modifications omitted), *quoting* 18 U.S.C. § 1962. The conduct constituting "racketeering activity" for purposes of Section 1962—generally referred to as conduct constituting a "predicate act" for purposes of a RICO claim—is set forth in full at 18 U.S.C. § 1961, particularly Section 1961(1). *See* 18 U.S.C. § 1961. Here, as noted above, CCI alleges that defendants' complained-of conduct constitutes predicate acts of wire fraud and of extortion.

Defendants argue, first, [7] that CCI's RICO claim is inadequately pled in that CCI has not alleged each defendant's specific involvement in conducting or directing the affairs of the alleged RICO enterprise. Defendants are correct that civil RICO liability is limited to persons or entities who play "*some* part in directing the enterprise's affairs," *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (emphasis original), but it is likewise true that a RICO defendant need not have "*significant control* over or within [the] enterprise" for RICO liability to attach, *id.* at 179 n. 4, The courts of the Ninth Circuit have found the following factors relevant to determining whether the *Reves* standard for control over or direction of the enterprise has been satisfied: (1) whether the defendant "occup[ied] a position in the chain of command ... through which the affairs of the enterprise [were] conducted," (2) whether the defendant "knowingly

implement[ed] decisions of upper management," and (3) whether the defendant's "participation was vital to the mission's success." *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) (citations, internal quotation marks omitted).

Here, CCI has alleged that all three defendants, "and each of them," directed the corporate defendants' agents to engage in complained-of conduct, including Polacek's email messages to CCI's employees and officers and the maintenance of a collection of consumer reviews hosted by a purportedly unbiased consumer advocacy organization that in reality presents an unwarrantedly positive impression of defendants' paying customers and an unwarrantedly negative impression of entities who refuse to become paying customers of the defendants. *See* Complaint, ¶¶ 34-38. Defendant argues that such allegations constitute improper "group pleading," but in fact a fair reading of the allegations is that each defendant directed the corporate defendants' agents to engage in the complained-of conduct (thus necessarily occupying positions in the chain of command of the enterprise), which is sufficient to satisfy the *Reves* standard. If defendants take issue with the accuracy of those allegations, the proper mechanism for challenging the factual basis of CCI's position that each defendant played a part in directing the alleged enterprise is a motion for summary judgment. Defendants' specific-involvement argument provides no grounds for dismissing CCI's RICO claim at this pleading stage of these proceedings.

***15** Second, defendants argue that CCI has not adequately alleged a "pattern" of racketeering activity. Specifically, defendants argue that CCI has alleged, at most, a single scheme to induce CCI to become one of defendants' accredited members, which defendants assert is insufficient to satisfy the pattern requirement.

The courts of the Ninth Circuit require a "threat of continuing activity" in order to find a "pattern" of racketeering activity. *Medallion Television Enters. v. SelecTV of Cal.*, 833 F.2d 1360, 1363 (9th Cir. 1987). "Continuity does not require a showing that the defendants engaged in more than one 'scheme' or 'criminal episode.' ... The circumstances of the case, however, must suggest that the predicate acts are indicative of a threat of continuing activity." *Id.* (citations omitted). Here, CCI has alleged just such a threat of continuing activity, in that, according to CCI's allegations, defendants continue to suppress positive reviews of CCI's services, continue to hold out their organization as one dedicated to unbiased consumer advocacy, and continue to offer relief from their improper manipulation of third-party consumer reviews to reviewed entities that pay significant sums of money to become accredited members. This alleged continuing activity is sufficient to satisfy the pattern requirement. Moreover, CCI has in any event alleged both several instances of efforts to use the threat of economic harm to CCI's business to extort payments from CCI and the deception of the public at large, effected via the internet, regarding the unbiased nature of the third-party reviews hosted on defendants' webpage. Those allegations support the inference that defendants engaged in at least two predicate acts of racketeering (multiple attempts to commit extortion and at least one act of wire fraud). Defendants' pattern argument thus provides no grounds for dismissing CCI's RICO claim at this pleading stage of these proceedings.

Third, defendants argue that CCI has not successfully alleged any predicate acts of wire fraud. In support of that argument, defendants assert both that CCI has failed to allege wire fraud with sufficient particularity to satisfy the heightened pleading standard of Federal Civil Procedure Rule 9(b) and that CCI has failed to allege that it suffered harm directly caused by alleged wire fraud.

To address defendants' arguments, it is necessary first to differentiate between the wire fraud actionable under the RICO statute and common-law fraud under Oregon law. It is well established that "state law is irrelevant in determining whether a certain course of conduct is violative of the wire fraud statute" for RICO purposes. *United States v. Louderman*, 576 F.2d 1383, 1387 (9th Cir. 1978). The wire fraud statute, by contrast with common-law fraud, makes unlawful "*any scheme or artifice* to defraud, or *for obtaining money or property by means of false or fraudulent pretenses, representations, or promises*" where the person who devised or intended to devise such scheme "transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343 (emphasis supplied). Moreover, "[t]he fraudulent nature of the 'scheme or artifice to defraud' is measured by a non-technical standard." *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980), *citing Louderman*, 576 F.2d at 1389. "Thus, schemes are

condemned which are contrary to public policy or which fail to measure up to the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.' " *Id.*, *quoting Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958). As such:

> ***16** The common-law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal [wire, mail, and bank] fraud statutes. *See, e.g.*, *United States v. Stewart*, 872 F.2d 957, 960 (CA10 1989) ("Under the mail fraud statute, the government does not have to prove actual reliance upon the defendant's misrepresentations"); *United States v. Rowe*, 56 F.2d 747, 749 (CA2) (L. Hand, J.) ("Civilly of course the mail fraud statute would fail without proof of damage, but that has no application to criminal liability"), *cert. denied*, 286 U.S. 554, 76 L.Ed. 1289, 52 S. Ct. 579 (1932). By prohibiting the "scheme to defraud," rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted.

Neder v. United States, 527 U.S. 1, 24-25 (1999) (internal modifications omitted); *see also Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 657-659 (2008) (noting that the common law recognizes a cause of action against persons who defraud other persons for the purpose of causing monetary harm to third parties; further noting that while reliance may sometimes be invoked in order to prove the element of causation, it is not thereby incorporated as an element of federal fraud).

CCI has alleged that defendants maintain a website which purports to host consumer reviews of CCI's products without regard to whether such reviews may be characterizable as reviews or complaints, but which in fact does not include all positive reviews of entities which refuse to become defendants' accredited members. Specifically, CCI has alleged that defendants have maintained that website at all material times up to and including the present. CCI has alleged that the website is specifically hosted by Consumer Affairs, that Carman is ConsumerAffairs' principal, that Consumers Unified is the entity by and through which accredited members contract with defendants, and that Carman is Consumers Unified's principal. It is CCI's position that this arrangement constitutes a scheme to deceive the public through the use of the wires for the purpose of causing CCI to suffer pecuniary harm. If the truth of CCI's allegations were established, that scheme would constitute wire fraud under Section 1343, and its elements have been alleged with particularity. Defendants' Rule 9(b) argument thus provides no grounds for dismissing CCI's RICO claim at this stage of these proceedings. Moreover, CCI has alleged ascertainable pecuniary harm directly caused by defendants' alleged deception of members of the public seeking reviews of CCI's services. *See* Complaint, ¶ 24. Defendants' direct-damage argument thus likewise provides no grounds for dismissal of CCI's RICO claim.

Fourth and finally, defendants argue that CCI has not successfully alleged any predicate acts of extortion. In support of that argument, defendants assert that CCI has alleged only that defendants advised CCI of the likelihood that it would suffer loss if it did not avail itself of defendants' legitimately beneficial services, and not that defendants improperly threatened to harm CCI's business in order to obtain wrongful payments from it.

For RICO purposes, the predicate act of extortion can be defined under state law, so long as the state law provides for the possibility of punishment by imprisonment for more than one year. *See* 18 U.S.C. § 1961(1) (A). Oregon's extortion statute, Or. Rev. Stat. § 164.075, defined extortion as a Class B felony, *see* Or. Rev. Stat. § 164.075(2), and as such is punishable by up to ten years of imprisonment, *see* Or. Rev. Stat. § 161.605. Violation of Oregon's extortion statute can therefore constitute a predicate offense for RICO purposes. *See* 18 U.S.C. § 1961(1)(A). Under Oregon's statute:

> ***17** A person commits theft by extortion when the person compels or induces another to deliver property to the person or to a third person by instilling in the other a fear that, if the property is not so delivered, the actor or a third person will in the future:
>
> * * *
>
> (b) Cause damage to property;
>
> (c) Engage in other conduct constituting a crime;
>
> * * *
>
> (e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule;
>
> * * *; or

(i) Inflict any other harm that would not benefit the actor.

Or. Rev. Stat. § 164.075(1).

I agree with the defendants that, under Oregon's statutory scheme, it is not extortion for a person to "threaten" only to withhold a benefit from another who lacks any right to that benefit, and where it is not independently wrongful for the benefit to be withheld. However, contrary to defendants' argument, CCI does not allege that defendants "threatened" only to withhold a beneficial service to which CCI had no pre-existing right, but rather that defendants, in addition to not permitting CCI to respond to or challenge negative reviews or to benefit from more favorable presentation of legitimately submitted third-party reviews, also affirmatively suppressed positive reviews without informing users of its webpage that it had done so, and indicated that it would continue doing so unless CCI became an accredited member. It is thus CCI's position that defendants attempted to extort tens of thousands of dollars in accredited membership fees from CCI under threat of improper harm to its reputation and to its business. As such, CCI has adequately alleged the predicate act of extortion, and defendants' final argument provides no grounds for dismissal of CCI's RICO claim.

In the absence of any grounds for dismissal of CCI's RICO claim, defendants' constructive motion to dismiss should be denied.

CONCLUSION

For the reasons set forth above, defendants' special motion (#9) to strike should be denied in its entirety, both *qua* special motion to strike and *qua* constructive motion to dismiss.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

All Citations

Slip Copy, 2016 WL 3176602

Footnotes

1 Defendants have filed a Corporate Disclosure Statement on behalf of Consumers Unified (a limited liability corporation), by and through which they assert that Consumers Unified is a citizen of "Delaware, Virginia, Florida, New Mexico, Massachusetts, Colorado, California, Nevada, and Oklahoma." Defendants do not otherwise disclose the identities or citizenship of the members of Consumers United.

2 Except where otherwise indicated, the following recitation constitutes my construal of the parties' evidentiary proffers in the light most favorable to CCI.

3 CCI offers the declaration testimony of its President and CEO, John S. Marick, that between January 1, 2014, and July 15, 2015, members of the public who viewed CCI's website became CCI customers between approximately 1.7 and 2.3% of the time. *See* Declaration of John S. Marick, ¶ 9.

4 Oregon Civil Procedure Rule 21 A provides a procedural mechanism for motions to dismiss, *see* Or. R. Civ. P. 21 A, while Oregon Civil Procedure Rule 21 F (which is expressly not applicable to motions brought under Section 31.150, *see* Or. Rev. Stat. 31.150(1)) permits motions to dismiss to be consolidated with other motions, *see* Or. R. Civ. P. 21 F.

5 Notwithstanding the foregoing, to the extent that Oregon's anti-SLAPP statute provides for an automatic stay of discovery when a special motion to strike is filed, because that provision would conflict with the Supreme Court's interpretation of Federal Civil Procedure Rule 56(f) as requiring discovery to proceed "where the nonmoving party has not had the opportunity to discover information that is essential to its opposition," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986), such automatic stay of discovery is necessarily inapplicable in federal court. *See Metabolife Int'l v. Wornick*, 264 F.3d 832, 846-847 (9th Cir. 2001).

6 Moreover, assuming *arguendo* that CCI's evidentiary proffer in support of its state-law claims to the extent alleged against Carman were insufficient to meet its burden at the second step of the two-step process, because evidence of Carman's direct involvement in or affirmative direction of the tortious conduct complained of in CCI's complaint would, assuming such evidence exists, necessarily be within defendants' possession and control, it would be inappropriate under *Metabolife, supra*, to grant defendants' special motion to strike as to any of the state-law claims to the extent alleged against Carman without first giving CCI the opportunity to conduct relevant discovery. *See* *Metabolife*, 264 F.3d at 846-847. On that *arguendo* assumption, therefore, defendants' special motion to strike as to CCI's state-law claims to the extent alleged against Carman would most appropriately be treated as a motion for summary judgment under Federal Civil Procedure Rule 56.

7 For purposes of determining the merits of defendants' constructive motion to dismiss CCI's RICO claim, I disregard defendants' arguments that necessarily pertain only to its arguments in favor of striking the RICO claim under Oregon's anti-SLAPP statute.

End of Document

2014 WL 5394924
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

Edmund DAVIS et al.
v.
ELRAC, LLC et al.

No. CV136037866S.
|
Sept. 26, 2014.

WILSON, J.

FACTS

***1** This action arises out of a fatal motor vehicle accident. The plaintiffs, Edmund Davis and Nicholas Davis, filed a seven-count amended complaint against the defendants Elrac, LLC (Elrac), Enterprise Rent–A–Car Co. (Enterprise), Tresor Kapila, and Dina Senibaldi. The defendants Elrac and Enterprise move to strike count three, a paragraph within counts six and seven, numerous paragraphs within counts six and seven, and count seven in its entirety. The operative complaint is the March 31, 2014 amended complaint, which alleges the following relevant facts. The plaintiff Edmund Davis was operating a motor vehicle that was owned by his son, the plaintiff Nicholas Davis, with a passenger, Lisa Delprete on April 8, 2011, on I–395 southbound. At said time and place, a 2010 Dodge Avenger operated by the defendant Senibaldi was also traveling southbound and rear ended the plaintiffs' vehicle. The Dodge Avenger was owned by and/or leased from the defendant Elrac and/or the defendant Enterprise. The Dodge Avenger was leased to the defendant Kapila and/or the defendant Senibaldi by the defendant Elrac and the defendant Enterprise. The defendant Kapila allowed his name to be used for the rental transaction but was not present at the time the Dodge Avenger was relinquished and he did not sign the rental agreement and no copy of a facially valid license was retained. The motor vehicle accident was due to the negligence and carelessness of the defendant Senibaldi.

The motor vehicle accident was also due to the negligence and carelessness and negligent entrustment of the motor vehicle to the defendants Kapila and/or Senibaldi by the defendants Elrac and Enterprise in the following ways. They relinquished possession/control of the vehicle to the defendants Kapila and Senibaldi to be used for criminal purposes; they knew or should have known that the defendants were not competent to drive and were unqualified and/or unlicensed to drive; they failed to determine Kapila and Senibaldi's accident history and criminal record; they failed to consult the validity of the driver's operator's license, driving history, and rental history; they failed to adequately investigate Kapila and Senibaldi's background and screen Kapila and Senibaldi to determine whether they would engage in criminal activity; they failed to require Kapila, Anderson, and Senibaldi to provide a valid motor vehicle license at the time of the rental and preserve a copy thereof; they failed to obtain return of the vehicle after Kapila, Anderson, and Senibaldi retained the vehicle beyond the terms of the rental agreement; they failed to equip the vehicle with a GPS system to determine its location after the expiration of the rental agreement; they knew or should have known that the vehicle had been recalled for defective or inadequate brakes; they failed to maintain appropriate policies and procedures to recover the vehicle after the expiration of the rental agreement; and they failed to report Kapila's, Anderson's, and Senibaldi's retention of the vehicle beyond the rental agreement to an appropriate law enforcement agency.

***2** As a result of said negligence, the plaintiff Edmund Davis suffered multiple physical injuries, incurred medical expenses, and suffered great pain and disability. The plaintiff Nicholas Davis suffered "mental and emotional anguish, and had to travel from San Diego California and miss time from work to render care and assistance to his father, the plaintiff Edmund Davis ... and has incurred expense as a result thereof." The plaintiff Edmund Davis, as the operator of his son's vehicle at the time of the collision had a contemporaneous perception of the injuries sustained by his passenger, Lisa Delprete, and observed Delprete's injuries, pain and suffering, which led to her death. As a result, the plaintiff Edmund Davis has suffered and will continue to suffer emotional distress and anguish.

Count one alleges negligence against Senibaldi; count two alleges recklessness against Senibaldi; count three alleges bystander emotional distress; count four alleges

negligence against Kapila; count five alleges negligent entrustment against Kapila; count six alleges negligence against the defendants, Elrac and Enterprise; and count seven alleges negligent entrustment against the defendants, Elrac and Enterprise.

On April 14, 2014, the defendants, Elrac and Enterprise, filed a motion to strike count three, a paragraph within counts six and seven, numerous paragraphs within counts six and seven, and count seven in its entirety of the plaintiff's amended complaint dated March 31, 2014. The defendants also filed a memorandum of law in support of the motion. The plaintiffs filed an objection to the motion on May 30, 2014. Accompanying the objection is a supporting memorandum of law, excerpts of the plaintiff, Edmund Davis' deposition transcript, excerpts of a May 5, 2014 short calendar hearing, and the plaintiff, Kristina DelPrete's May 29, 2014 objection and memorandum of law in opposition to the motion to strike in the companion case, *Delprete v. Senibaldi,* Superior Court, judicial district of New Haven at New Haven, Docket No. NNH–CV–11–6024795–S. The court heard oral argument on the motion at short calendar on June 2, 2014.

DISCUSSION

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves,* 262 Conn. 480, 498, 815 A.2d 1188 (2003). In ruling on a motion to strike, the court takes "the facts to be those alleged in the [complaint] ... and ... construe[s] the [complaint] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *New London County Mutual Insurance Co. v. Nantes,* 303 Conn. 737, 747, 36 A.3d 224 (2012). "It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Coe v. Board of Education,* 301 Conn. 112, 116–17, 19 A.3d 640 (2011). "It is well established that a motion to strike must be considered within the confines of the pleadings and not external documents ... [The court is] limited ... to a consideration of the facts alleged in the complaint." (Internal quotation marks omitted.) *Zirinsky v. Zirinsky,* 87 Conn.App. 257, 268 n. 9, 865 A.2d 488, cert. denied, 273 Conn. 916, 871 A.2d 372 (2005); see also *Rowe v. Godou,* 209 Conn. 273, 278, 550 A.2d 1073 (1988) (the court cannot resort to information outside of the complaint in ruling on a motion to strike). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC v. Ganim,* 303 Conn. 205, 213, 32 A.3d 296 (2011).

I

COUNT THREE

***3** The defendants move to strike count three, which alleges bystander emotional distress, on the ground that it is legally insufficient because the plaintiff Edmund Davis has failed to plead the requisite elements of a close relationship with the decedent. The plaintiffs argue that the claim is legally sufficient because the plaintiff Edmund Davis had a close, intimate and romantic relationship with the decedent, Lisa Delprete, and the issue of whether such a relationship suffices for a claim sounding in bystander emotional distress has never been decided by our courts.

The essential elements for a claim for emotional bystander distress has been established by our Supreme Court in the seminal case, *Clohessy v. Bachelor,* 237 Conn. 31, 675 A.2d 852 (1996). There, the court stated: "[A] bystander may recover damages for emotional distress under the rule of reasonable foreseeability if the bystander satisfies the following conditions: (1) he or she is closely related to the injury victim such as the parent or the sibling of the victim; (2) the emotional injury of the bystander is caused by the contemporaneous sensory perception of the event or conduct that causes the injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the victim's condition or location; (3) the injury of the victim must be substantial, resulting in his or her death or serious physical injury; and (4) the bystander's emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response." *Id.,* at 56.

In the present case, the plaintiffs' allegations of bystander emotional distress are legally insufficient. Count three incorporates paragraphs 1 through 5 of count one. In paragraph 1, the plaintiffs expressly allege the relationship

between the plaintiff Edmund Davis and the plaintiff Nicholas Davis as father/son. Although the plaintiffs mention the decedent, Lisa Delprete, the plaintiffs fail to set forth any allegations relevant to determining the nature of the relationship between the plaintiff Edmund Davis and the decedent. Moreover, there are no allegations in the remaining paragraphs of 1 through 5 in count one, or in count three, that either expressly or impliedly pertain to the relationship between the plaintiff Edmund Davis and the decedent. Because the plaintiffs fail to sufficiently plead element one of a bystander emotional distress claim, count three is legally insufficient.

In response to the defendants' argument, the plaintiffs direct the court to excerpts of the plaintiff Edmund Davis's transcript, which support his allegation that he and the decedent had a "close, intimate, and romantic relationship." "It is well established, [however,] that a motion to strike must be considered within the confines of the pleadings and not external documents ... [The court is] limited ... to a consideration of the facts alleged in the complaint. A speaking motion to strike (one importing facts outside the pleadings) will not be granted." (Internal quotation marks omitted.) *Zirinsky v. Zirinsky,* 87 Conn.App. 257, 268–69 n. 9, 865 A.2d 488, cert. denied, 273 Conn. 916, 871 A.2d 372 (2005); see also *Rowe v. Godou,* 209 Conn. 273, 278, 550 A.2d 1073 (1988) (in ruling on motion to strike, court cannot resort to information outside of complaint). Thus, to the extent that the plaintiffs' argument utilizes factual representations in the transcripts in support of their objection to the motion, these facts cannot be considered by the court. Further, because there are no allegations relating to the nature of the relationship, the court need not address whether such a relationship rises to the level of a "close relationship" for purposes of bystander emotional distress.

***4** Accordingly, since the plaintiffs have failed, expressly or impliedly, to sufficiently plead any facts pertaining to the nature of the relationship between the plaintiff Edmund Davis and the decedent, the plaintiffs' claim for bystander emotional distress is legally insufficient. Therefore, the defendants' motion to strike count three of the plaintiffs' complaint is granted.

II

PARAGRAPH 21 OF COUNTS SIX AND SEVEN

The defendants move to strike paragraph 21 of the March 31, 2014 amended complaint on the ground that, absent allegations of direct or bystander emotional distress, an adult child, the plaintiff Nicholas Davis, cannot recover emotional anguish and consequential damages for expenses incurred as a result of caring for his injured parent, the plaintiff Edmund Davis. The amended complaint does not contain a "paragraph 21" in either count six or seven, as referenced by the defendants in their memorandum of law. The allegations contained in what defendants describe as "paragraph 21" are the same as those contained in paragraph 10 in count one of the plaintiffs' March 31, 2014 amended complaint. In addition, paragraph 10 is correspondingly incorporated into both counts six and seven. Thus, the court will address the defendants' motion as to it pertains to the allegations contained in paragraph 10, which have been incorporated in both counts, and will hereinafter refer to paragraph 21 as paragraph 10.

Before addressing the merits of the defendants' arguments, the court will first address whether it is procedurally proper to attack the legal sufficiency of a paragraph, as opposed to an entire count. "A single paragraph or paragraphs can only be attacked for insufficiency when a cause of action is therein attempted to be stated, and then only by [a motion to strike]. The only remedy 'by which to test the sufficiency of a cause of action or defense, whether stated in one pleading, count or defense, or in a paragraph or paragraphs thereof,' is a [motion to strike]." *Donovan v. Davis,* 85 Conn. 394, 397–98, 82 A.1025 (1912); see also *Zamstein v. Marvasti,* 240 Conn. 549, 567, 692 A.2d 781 (1997) (Supreme Court upheld, without discussion, trial court's granting of motion to strike single paragraph of complaint where paragraph set forth separate cause of action). Although there is a split at the trial court, "[m]ost trial courts follow the rule that a single paragraph of a pleading is subject to a motion to strike only when it attempts to set forth all of the essential allegations of a cause of action or defense ... Arguably under the present rules, a motion to strike may properly lie with respect to an individual paragraph [or paragraphs] in a count ... However, the weight of authority in the Superior Court is that the motion does not lie, except possibly where the subject paragraph [or paragraphs] attempts to state a cause of action ... [O]nly an entire

count of a [complaint,] counterclaim or an entire special defense can be subject to a motion to strike, unless the individual paragraph [or paragraphs] embodies an entire cause of action or defense." (Internal quotation marks omitted.) *Weingarden v. Milford Anesthesia Associates, P.C.,* Superior Court, judicial district of New Haven Docket No. CV–11–6016353–S (May 30, 2013, Wilson, J.).

***5** The defendants move to strike paragraph 10 on the basis that it attempts to allege a separate cause of action. Paragraph 10 alleges: "The Plaintiff, Nicholas Davis has suffered mental and emotional anguish, and has had to travel from San Diego, California and miss time from work to render care and assistance to his father, the Plaintiff, Edmund Davis by reason of said injuries, and has incurred expense as a result thereof." When comparing paragraph 10 to other paragraphs contained in this count, it appears that the plaintiffs are attempting to set forth a separate cause of action. Most of the surrounding paragraphs pertain to the plaintiff Edmund Davis, whereas paragraphs 10 and 11 pertain only to the plaintiff Nicholas Davis. In addition, it is not entirely clear which cause of action is being asserted in paragraph 10. The paragraph may be supportive of four possible claims: 1) a claim for consequential damages; 2) bystander emotional distress; 3) negligent infliction of emotional distress; and 4) parental loss of consortium. The plaintiffs do not explicitly state in their objection which claim this paragraph attempts to set forth. They do state in their objection, however, in response to the defendants construing the claim as one sounding in bystander emotional distress, that the plaintiff Nicholas Davis was in California and the "claims relate to attending to his father and his travel from California to attend to his father." Based on this, the court concludes that the plaintiffs are negating the possibility of a claim sounding in bystander emotional distress. Therefore, the court will address the legal sufficiency of paragraph 10 to the extent the paragraph alleges a claim for loss of parental consortium; consequential damages; and negligent infliction of emotional distress.

A

Loss of Parental Consortium

As a general matter, our Appellate Court has held that "[t]he right of consortium is said to arise out of the civil contract of marriage and as such, does not extend to the parent-child relationship." *Mahoney v. Lensink,* 17 Conn.App. 130, 141, 550 A .2d 1088 (1988), aff'd in part and rev'd in part on other grounds, 213 Conn. 548, 569 A.2d 518 (1990). Nevertheless, "[a] motion to strike is the proper procedural vehicle ... to test whether Connecticut is ready to recognize some newly emerging ground of liability." (Internal quotation marks omitted.) *Prada v. Bova,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV–12–6014139–S (January 30, 2013, Adams, J.T.R .) (55 Conn. L. Rptr. 451, 452). The judiciary "[has] the inherent authority, pursuant to the state constitution, to create new causes of action." *ATC Partnership v. Coats North America Consolidated, Inc.,* 284 Conn. 537, 552–53, 935 A.2d 115 (2007). While "Connecticut case law reveals no hard and fast test that courts apply when determining whether to recognize new causes of action"; *id.,* at 552; a number of guiding principles can be found. The first relevant guideline is that courts "look to see if the judicial sanctions available are so ineffective as to warrant the recognition of a new cause of action." *Id.,* at 553. Second, courts "are mindful of growing judicial receptivity to the new cause of action"; *id.;* taking into account the judicial trend. See *Mendillo v. Board of Education,* 246 Conn. 456, 494, 717 A.2d 1177 (1998). "[T]he ultimate decision comes down to a matter of judgment in balancing the competing interests involved." *Id.,* at 495.

***6** The Supreme Court in *Mendillo v. Board of Education* referred to the abovementioned guidelines and declined to recognize a parental loss of consortium cause of action brought by a minor child .[1] The court reached its conclusion "primarily on the basis of: the fact that recognition of the cause of action would require arbitrary limitations; the additional economic burden that recognition would impose on the general public; the uncertainty that recognition would yield significant social benefits; the substantial risk of double recovery; and the weight of judicial recovery." *Mendillo v. Board of Education, supra,* 246 Conn. at 485. The court further elaborated: "[I]f we were to recognize the claim as asserted by the plaintiffs—i.e., limited to loss of parental consortium suffered by minor plaintiffs resulting from serious injury to the parent—we would have to impose arbitrary limitations on the scope of the cause of action in order to avoid the creation of a practically unlimited

class of potential plaintiffs. In the constellation of family relationships, there are other formally recognized relationships—e.g., siblings, grandparent and grandchild, and aunt or uncle and nephew or niece-and others, less formally recognized but just as real in an emotional sense—e.g., stepsiblings, and stepchild and stepparent—that could well, depending on the case, present equally strong claims of loss of consortium. Similarly, there is nothing in the underlying rationale for recognition of the claim to confine it to minor children ... There undoubtedly are adult children who suffer a genuine loss of consortium by virtue of their parent's injury." *Id.,* at 485–86. The court further determined: "[T]here is nothing in reason to differentiate the parent's loss of the joy and comfort of his child from that suffered by the child." *Id.,* at 485 n. 20. Based on this rationale, the trend among the judges of the Superior Court is that "[l]oss of consortium claims are limited to spouses and do not extend to claims for loss of parental or filial consortium." *Browne v. Kommel,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV–08–5066167–S (July 14, 2009, Pavia, J.) (48 Conn. L. Rptr. 248, 249); see also *Mettler v. Fortunati,* Superior Court, judicial district of New Haven, Docket No. CV–09–5031305–S (November 18, 2011, Fischer, J.).

In the present case, to the extent that the plaintiffs attempt to set forth a claim for loss of parental consortium, the court concludes that the claim is legally insufficient because loss of parental consortium is not a legally recognized cause of action in Connecticut. Furthermore, although a claim for loss of parental consortium, and its legal sufficiency, has been addressed in the context of minor children, the plaintiffs have failed to set forth any rationale as to why the cause of action should be recognized as to adult children. Indeed, the Supreme Court in *Mendillo* explained that if it were to recognize such a cause of action for a parent-child relationship, there would be no underlying rationale for limiting the recognition of the claim to minor children. Even in the context of adult children, the court noted that "[t]here undoubtedly are adult children who suffer a genuine loss of consortium by virtue of their parent's injury." *Mendillo v. Board of Education, supra,* 246 Conn. at 488. Thus, recognizing the cause of action for parental loss of consortium in the context of adult children, and the underlying rationale for doing so, would mandate recognizing such cause of action within the context of minor children. Limiting the applicability of the claim to adult children and not minor children would likewise be an arbitrary limitation as to the class of children. Accordingly, to the extent that the plaintiffs' attempt to allege a claim sounding in loss of parental consortium, in light of the court's reasoning set forth in *Mendillo,* and the judicial trend refusing to recognize loss of parental consortium as a cause of action, the claim is legally insufficient. Therefore, to the extent that paragraph 10 attempts to set forth a cause of action for parental loss of consortium, the defendants' motion to strike that paragraph is granted.

B

Consequential Damages

***7** The defendants move to strike paragraph 10 to the extent that it attempts to allege a claim for consequential damages. The defendants argue that because the plaintiff Nicholas Davis is an adult child, he is unable to recover any consequential damages that flowed from his father's injuries.[2] The plaintiffs do not set forth any argument in their objection as to whether they are attempting to bring a claim for consequential damages.

"Consequential damages are defined as [l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act ... Liability for consequential damages is determined through consideration of whether the tortfeasor owes a legal duty to the claimant." *Vera Burnette, PPA v. Boland,* Superior Court, judicial district of New London, Docket No. CV–08–5009111–S (April 23, 2010, Martin, J.), quoting Black's Law Dictionary (7th Ed.1999).

The defendants cite to *Mendillo v. Board of Education* in support of their position that a claim for consequential damages is not a recognized cause of action. The Supreme Court in *Mendillo* briefly discussed liability for consequential damages within the context of a parental loss of consortium claim. The court stated: "Whether an additional policy consideration justifies, in any given case, the imposition of liability for consequential damages, such as those claimed by the minor plaintiffs, is determined through consideration of whether the tortfeasor owes a legal duty to the claimants ... The existence of a duty is a question of law and only if such a duty is found to

exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand ... We have stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case ... The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Citations omitted; internal quotation marks omitted.) *Mendillo v. Board of Education, supra,* 246 Conn. at 483–84.

The court finds the defendants' reliance on *Mendillo* is misplaced. As discussed in section IIA of this opinion, the Supreme Court in *Mendillo* primarily addressed the issue of whether there is a legally recognized cause of action for loss of parental consortium. While there is a slight overlap in both a cause of action for parental loss of consortium and a cause of action for consequential damages, in that damages in both causes of action arise from the same negligent act, the claims are distinct. See *Joyner v. Auger,* Superior Court, judicial district of New London, Docket No. 544575 (August 5, 1999, Martin, J.) (25 Conn. L. Rptr. 223, 224 n. 1) (claim for consequential damages is different than a claim for loss of consortium); *Mainville v. Rockville General Hospital, Inc.,* Superior Court, judicial district of Tolland, Docket No. CV–98–66240–S (December 1, 1998, Sullivan, J.) (same). Consequential damages is a legally recognized cause of action; see *Krause v. Almor Homes, Inc.,* 147 Conn. 333, 335–36 160 A.2d 753 (1960); and focuses on the economic losses. *Mainville v. Rockville General Hospital, Inc., supra,* Superior Court, Docket No. CV–98–66240–S. A claim for loss of parental consortium, on the other hand, pertains to loss of "companionship, society, affection and moral support." *Id.* Thus, although a claim for loss of parental consortium is not recognized in this state, it does not necessarily follow that a claim for consequential damages is similarly not recognized. In fact, "[b]oth the parent and the child have a right to claim consequential damages from a tortfeasor." *Id.*

***8** Moreover, *Mendillo* is factually distinguishable from the present because in *Mendillo,* the *minor* plaintiffs were contending that the court should recognize a claim for loss of parental consortium resulting from a serious injury to the child's parent. Here, the claim is being brought by the adult child for serious injuries sustained by his adult parent as a result of the alleged negligence of a third party. The distinction between an adult child and a minor child is significant for purposes of a consequential damages claim.

In addressing whether an adult child can bring a cause of action for consequential damages for losses paid on behalf of a parent who sustained personal injuries due to the negligence of a third party, it is first important to note that our courts have allowed a parent to recover economic losses paid on behalf of a *minor* child who sustained injuries due to the negligent act of a third party. *Krause v. Almor Homes, Inc., supra,* 147 Conn. at 335. In *Krause v. Almor Homes, Inc.,* for example, the court stated: "[W]hen a *minor child* is injured by the negligent act of a third party, two causes of action immediately spring into existence; first, the right of action by the child itself for the personal injuries inflicted upon it; and second, a right of action to the parent for consequential damages, such as loss of services and expenses, caused by the injury to the child. The right of the parent to recover is independent of the right of the child ..." (Emphasis added; internal quotation marks omitted.) *Krause v. Almor Homes, Inc.,* 147 Conn. 333, 335, 160 A.2d 753 (1960). This right of a parent to recover consequential damages for injuries suffered by their child as a result of the negligence of another is limited to loss of services and "expenses incurred and ... reimbursement for the *reasonable value of the care provided to their injured child* if they sacrificed their own earnings from employment in rendering that care ... Such a claim may be brought even though the child also brings a claim for injuries in the same action." (Emphasis added.) *Vera Burnette, PPA v. Boland,* Superior Court, judicial district of New London, Docket No. CV–08–5009111–S (April 23, 2010, Martin, J.).

In paragraph 10, the plaintiffs allege: "The [p]laintiff, Nicholas Davis has suffered mental and emotional anguish, and has had to travel from San Diego, California and miss time from work to render care and assistance to his father, the [p]laintiff, Edmund Davis by reason of said injuries, and has incurred expense as a result thereof." Although this paragraph sets forth allegations as to the expenses that the plaintiff Nicholas Davis incurred as a result of rendering care to his injured father, the claim might be legally sufficient if the plaintiff Edmund Davis

were the *minor* child. And the plaintiff Nicholas Davis was his parent.

Having stated that courts have allowed a parent to recover economic losses paid on behalf of a *minor* child due to the negligent act of a third party, it is important to note that courts have held that a parent may not recover economic losses on behalf of an *adult* child. Relying on *Krause, supra,* 147 Conn. at 335, courts have found that such a claim may not be brought by the parents. *Anderson v. Hartford,* Superior Court, judicial district of Hartford–New Britain, Docket No. CV–92–0508411–S (September 25, 1992, Wagner, J.) (7 Conn. L. Rptr. 427, 427–28); *Kershaw v. Housatonic Cablevision Co.,* Superior Court, judicial district of Fairfield, Docket No. CV–90–0271383 (February 19, 1991, Nigro, J.) [3 Conn. L. Rptr. 296].

***9** In *Anderson v. Hartford,* the court was presented with the issue of whether a mother could bring a claim for consequential damages on behalf of her adult daughter, who had allegedly suffered injuries due to a slip and fall. The opposing party argued that the mother could not be made a party plaintiff because under Connecticut law, a parent may only recover expenditures for the care of a minor child. In determining that the claim could not be brought and denying the adult plaintiff's mother's Motion to Join as a Party Plaintiff, the court noted that "[n]o Connecticut authority has been drawn to our attention which permits a claim by a parent for consequential damages incurred by the parent as a result of injuries sustained by an *adult child.* Connecticut courts have recognized such a cause of action by a parent only for damages resulting from the injuries sustained by a *minor child.*" (Emphasis added.) *Anderson v. Hartford, supra,* 7 Conn. L. Rptr. at 427.

Also in support of its decision to deny the motion, the court in *Anderson* looked to the language of General Statutes § 52–204 which provides: "In any civil action arising out of personal injury or property damage, as a result of which personal injury or property damage the husband or parent of the plaintiff has made or will be compelled to make expenditures or has contracted indebtedness, the amount of such expenditures or indebtedness may be recovered by the plaintiff, provided a recovery by the plaintiff shall be a bar to any claim by such husband or parent, except in an action in which the husband or parent is a defendant." The court explained, citing *Savona v. General Motors Corp.,* 640 F.Sup. 6, 10 (D.Conn.1985): "While [§] 52–204 provides a vehicle by which a plaintiff child can recover expenses incurred by his parent in lieu of that parent bringing a cause of action on his own behalf, it cannot be viewed as a basis upon which a parent can file a claim on his own behalf ... [W]hile Connecticut courts have recognized the right of a parent of a *minor* child to recover for expenses incurred as a result of injuries to the child, the plaintiffs in *Savona* had 'failed to point to any state statute or common law precedent which stands for the proposition that a parent has an independent cause of action to recover expenses incurred as a result of personal injury to a child *not a minor.*' " (Citations omitted; emphasis added; internal quotation marks omitted.) *Anderson, supra.* Thus, the court denied the plaintiffs mother's motion to join as a party plaintiff.

Although a plain reading of the language in § 52–204 suggests that any plaintiff child, minor or adult, may bring a claim for expenses incurred by his or her parent, the statute has not been construed in this manner by our courts. First, the statute has been applied in the context of minor children only. See *Lynk v. First Student, Inc.,* Superior Court, judicial district of New Haven at Meriden, Docket No. CV–10–6001332–S (August 25, 2010, Matasavage, J.) (50 Conn. L. Rptr. 545, 545–56) (*minor* plaintiff was injured when he was struck in head by a lunch box and father, in his individual capacity, alleged claim for medical expenses he had incurred as a result of defendant's negligence); *Botelho v. Curtis,* 28 Conn.Sup. 493, 497, 267 A.2d 675 (1970) (section vested in *minor* child the right to recover expenses resulting from personal injuries which child sustained).

***10** Second, the statute provides an alternative avenue by which a plaintiff minor child can recover expenses incurred by his or her parent instead of that parent bringing a separate cause of action on the parent's own behalf. *Lynk v. First Student, Inc., supra,* 50 Conn. L. Rptr. at 546; *Roach v. First Student Transportation, LLC,* Superior Court, judicial district of New Haven, Docket No. CV–10–6007924–S (August 18, 2010, Lager, J.) (50 Conn. L. Rptr. 517, 518); *Cimino v. Yale University,* 638 F.Sup. 952 (D.Conn.1986), citing *Savona v. GM,* 640 F.Sup. 6, 10, (D.Conn.1985). Generally, "[t]he parents of an injured child ... may bring a claim for expenses incurred as a result of their child's injury in a separate count, even though the child also brings a claim for injuries in the same action." (Internal quotation marks omitted.) *Lynk v. First Student, Inc., supra,* 50 Conn. L. Rptr. at 546, quoting,

Mercede v. Kessler, Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket No. CV–99–0172682–S (February 13, 2001, Karazin, J.) (29 Conn. L. Rptr. 246, 247). Section 52–204 simply allows a plaintiff child to recover expenses incurred by his or her parent instead of the parent bringing a separate cause of action on the parent's own behalf. This is explained thoroughly by the court in *Roach v. First Student Transportation, LLC, supra,* 50 Conn. L. Rptr. at 518.

In *Roach v. First Student Transportation,* the court explained: "Under the common law of Connecticut, two causes of action arise when a minor is injured by the negligent act of a third party: the minor's action to recover for the personal injuries she sustained and the parents' action to collect for damages resulting from the injury to the child, such as medical expenditures ... The right of the parent to recover is independent of the right of the child, and the judgment in an action brought by the child would not preclude the parent from recovery in an action brought by him unless ... [a parent] brought the action as next friend of his daughter and the entire damages were claimed in it. The parent is not regarded in law as either a party or privy to an action brought by a child and hence is not bound by the judgment thereunder ... Historically, it has been common for parents to assert their common-law right to damages at the same time their minor child has brought a claim ...

"The common law also permitted a parent to waive the right to recover damages in favor of the child by bringing an action for the minor alone as next friend ... In addition, by statute a parent could consent to the minor plaintiff's direct recovery of damages based on the parent's past and future expenditures on behalf of the minor. See, e.g., General Statutes § 7947 (Rev.1949); General Statutes § 842d (Cumulative Supplement 1937) General Statutes § 602a (Cumulative Supplement Jan. Sess.1931). In 1951, this statutory authority was amended to add language that would bar double recovery by both the parent and the child. General Statutes § 7947 as amended by Sec. 1369b (Cumulative Supplement 1951).

***11** "The language of present General Statutes § 52–204 is identical to the 1951 revision ... The Supreme Court had an opportunity to review the statutory language in *Dzenutis v. Dzenutis,* [200 Conn. 290, 308, 512 A.2d 130 (1986),] a two-count action in which both the minor plaintiff and his mother sought to recover damages as result of severe burns that the minor sustained when he tripped over an unguarded bucket of hot tar. There, the court made it clear that [a]lthough General Statutes § 52–204 authorizes the recovery of medical expenses in an action solely in behalf of the injured child and makes the recovery in such an action a bar to any claim by the parent for such expenses, the statute does not mandate that procedure, in upholding recovery by the mother of medical expenses for the treatment of her son.

"Thus, although § 52–204 prohibits double recovery of the same damages for medical expenditures by both parent and child, it does not bar the two independent causes of action ... The parents and their injured minor child may choose to elect to bring their claims in this manner even if it does not make practical sense to the defendant. Section 52–204 bears on this case only to prescribe the amount of damages that can be awarded if liability is found." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Roach v. First Student Transportation, supra,* 50 Conn. L. Rptr. at 518.

In the present case, the plaintiffs in paragraph 10 are attempting to set forth a cause of action for consequential damages the plaintiff Nicholas Davis incurred as a result of attending to his injured father. This claim is legally insufficient for the following reasons. The plaintiffs allege: "The [p]laintiff, Nicholas Davis has suffered mental and emotional anguish, and has had to travel from San Diego, California and miss time from work to render care and assistance to his father, the [p]laintiff, Edmund Davis by reason of said injuries, and has incurred expense as a result thereof." As previously stated, although this paragraph sets forth allegations as to the expenses that the plaintiff Nicholas Davis incurred as a result of rendering care, this allegation might be legally sufficient if the plaintiff Edmund Davis were the minor child and the plaintiff Nicholas Davis were the parent. Nicholas Davis is the adult child of the plaintiff Edmund Davis, a fact that the plaintiffs do not dispute. Because courts have limited a claim for consequential damages brought by parents to their minor children injured by the negligence of a third party, an adult child may not bring a claim for expenses paid on behalf of an injured parent. Thus, because the plaintiff Nicholas Davis is an adult child, and our courts have not extended the applicability of a claim for consequential damages to adult children, paragraph 10 is legally insufficient. Accordingly, to the extent that paragraph 10 attempts to allege a separate cause of action

for consequential damages, the defendants' motion to strike paragraph 10 is granted. [3]

C

Negligent Infliction of Emotional Distress

***12** The defendants have also moved to strike paragraph 10 to the extent that it attempts to allege a claim sounding in negligent infliction of emotional distress. The defendants argue that the claim is legally insufficient because the plaintiffs fail to allege emotional distress severe enough to result in illness or bodily harm. Again, the plaintiffs have failed to set forth any argument in their objection as to whether they are attempting to bring a negligent infliction of emotional distress claim.

A claim for negligent infliction of emotional distress must include the following elements: "(1) [T]he defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2)[T]he plaintiff's distress was foreseeable; (3)[T]he emotional distress was severe enough that it might result in illness or bodily harm; and (4)[T]he defendant's conduct was the cause of the plaintiff's distress." *Carrol v. Allstate Insurance Co.,* 262 Conn. 433, 444, 815 A.2d 119 (2003). "[T]he plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that distress, if it were caused, might result in illness or bodily harm." (Internal quotation marks omitted.) *Id.,* at 446.

In the present case, the only part of paragraph 10 that may be relevant for purposes of bringing a negligent infliction of emotional distress claim is "Nicholas Davis has suffered mental and emotional anguish." The remainder of the paragraph, as discussed in section IIB, *supra,* relates to the plaintiffs' claim for consequential damages. The plaintiffs fail to allege any facts as to whether the defendants' conduct created an unreasonable risk of causing the plaintiff emotional distress, whether the plaintiff's distress was foreseeable, and whether the defendants' conduct was the cause of the plaintiff's distress. At most, the allegation "Nicholas Davis has suffered mental and emotional anguish" is relevant to whether the third element of the claim has been sufficiently pleaded. Because there are no other allegations set forth in the paragraph as to the other three remaining elements, to the extent that paragraph 10 attempts to set forth a claim sounding in negligent infliction of emotional distress, the claim is legally insufficient. Accordingly, to the extent that paragraph 10 attempts to allege negligent infliction of emotional distress, the motion to strike that paragraph is granted.

III

SUBPARAGRAPHS IN COUNT SIX AND COUNT SEVEN

The defendants move to strike subparagraphs 15(a)–15(c), 15(h)–15(n), 15(r)–15(v), 15(z)–15(ad) and 15(ag) of the sixth count on the ground that said paragraphs insufficiently allege negligent entrustment theories within the negligence count. In sum, the aforementioned paragraphs allege that the defendants relinquished possession/control of the vehicle to the defendants Kapila and Senibaldi to be used for criminal purposes; knew or should have known that the defendants were not competent to drive and were unqualified and/or unlicensed to drive; failed to determine Kapila and Senibaldi's accident history and criminal record; failed to consult the validity of the driver's operator's license, driving history, and rental history; failed to adequately investigate Kapila and Senibaldi's background and screen Kapila and Senibaldi to determine whether they would engage in criminal activity; failed to require Kapila, Anderson, and Senibaldi to provide a valid motor vehicle license at the time of the rental and preserve a copy thereof, and knew or should have known that Kapila was renting the vehicle for an unqualified and/or unlicensed operator.

***13** The defendants also move to strike subparagraphs 15(d)–15(g), 15(p)–15(r), 15(x)–15(z), 15(af)–15(ag) of the seventh count on the ground that said paragraphs insufficiently allege negligence theories within the negligent entrustment count. In sum, said paragraphs allege that the defendants failed to report to local law enforcement Senibalidi's retention of the vehicle; failed to maintain appropriate policies and procedures to recover the vehicle after the expiration of the rental agreement; failed to maintain warning stickers on motor vehicles with recall histories; failed to equip the vehicle with a GPS; failed to extend its "Black Listing" methods to

protect its financial interest; and knew or should have known that the motor vehicle had been recalled for defective or inadequate brakes. The plaintiffs argue that the grounds raised by the defendants for challenging the aforementioned subparagraphs should have been raised by way of a request to revise rather than a motion to strike.

The precise ground upon which the defendants base their motion to strike these subparagraphs is not clear. In addition to the legal insufficiency ground on which they base their motion, the defendants seem to also argue that the subparagraphs contained within the negligence count and the subparagraphs contained within the negligent entrustment count are "mixed predicates" for two causes of action. More specifically, the defendants argue that the negligence count contains allegations of a negligent entrustment claim, and the negligent entrustment count contains allegations of a negligence claim, which they argue is procedurally improper, and therefore should be stricken.

Although the plaintiffs' amended complaint is not well drafted, a careful review of counts six and seven demonstrate that the plaintiffs are bringing one count sounding in negligence and the other sounding in negligent entrustment. In particular, paragraph 15 of the sixth count specifically alleges "[s]aid occurrence was due to the active *negligence and carelessness* of the defendant ... through their agents, servants, employees and/or distributors in any one of the following ways ..." (Emphasis added.) Paragraph 15 of the seventh count specifically alleges that "[s]aid occurrence was due to the *negligent entrustment* of the 2010 Dodge Avenger by the defendant[s] ... their respective agents, servants/employees and distributors ..." (Emphasis added.) The language is explicit enough to inform the defendants and the court that both negligence and negligent entrustment claims are being asserted. Because the plaintiffs have pleaded these two counts separately, at best the defendants' argument may pertain to the substantial overlap and duplicity of allegations in both counts. The court therefore agrees with the plaintiff that the defendants' procedural argument should have been more appropriately raised in a request to revise.

"Whenever any party desires to obtain ... the deletion of any unnecessary ... or otherwise improper allegations in an adverse party's pleading ... the party desiring any such amendment in an adverse party's pleading may file a timely request to revise that pleading." Practice Book § 10–35. Practice Book § 10–35 provides in relevant part: "Whenever any party desires to obtain (1) a more complete or particular statement of the allegations of an adverse party's pleading, or (2) the deletion of any unnecessary, repetitious, scandalous, impertinent, immaterial or otherwise improper allegations in an adverse party's pleading, or (3) separation of causes of action which may be united in one complaint when they are improperly combined in one count ... or (4) any other appropriate correction in an adverse party's pleading, the party desiring any such amendment ... may file a timely request to revise that pleading." "The purpose of the request to revise is to secure a statement of the material facts upon which the pleader is based ... The test is not whether the pleading discloses all that the adversary desires to know in aid of his own cause, but whether it discloses the material facts which constitute the cause of action ... Whether a more particular statement is required is largely within the discretion of the court." (Internal quotation marks omitted.) *Sterling v. Camplin,* Superior Court, judicial district of Windham, Docket No. CV–13–6006239–S (July 17, 2013, Riley, J.) (56 Conn. L. Rptr. 509, 510).

***14** Moreover, other than asserting that the subparagraphs alleged in counts six and seven contain "mixed predicates" for two causes of action, the defendants have failed to cite to any legal authority or provide any legal analysis regarding this apparent procedural argument. "[I]t is well-established that the court is not required to review issues that have been improperly presented to [the] court through an inadequate brief ... Analysis, rather than mere abstract assertion is required in order to avoid abandoning an issue by failure to brief the issue properly." *Building Solutions Since 1977, LLC v. New Haven Housing Authority,* Superior Court, judicial district of New Haven, Docket No. CV–13–6041740–S (April 23, 2014, Nazzaro, J.) The court therefore concludes that the defendants have abandoned their procedural argument as a ground for granting the motion to strike. However, because the defendants have adequately raised and briefed the legal insufficiency grounds raised in their motion to strike, the court will address the legal sufficiency of the subparagraphs contained in counts six and seven. As previously discussed, "A single paragraph or paragraphs can only be attacked for insufficiency when a cause of action is therein

attempted to be stated, and then only by [a motion to strike]." *Donovan v. Davis, supra,* 85 Conn. at 397–98.

The defendants move to strike subparagraphs 15(a)–15(c), 15(h)–15(n), 15(r)–15(v), 15(z)–15(ad) and 15(ag) of count six on the ground that said paragraphs insufficiently allege negligent entrustment theories within the negligence count. In particular, the defendants argue that a negligent entrustment claim requires actual or constructive knowledge of a readily apparent incompetency and no duty exists under Connecticut law requiring a motor vehicle lessor to investigate a potential renter's driving or criminal records.

A

Graves Amendment

The defendants argue that the Graves Amendment, 49 U.S.C. § 30106, bars the plaintiffs' vicarious liability claim against them because the plaintiffs have not sufficiently pled their claim of negligent entrustment against the defendants to fall within the exception to preemption under § 30106(a)(2) of the federal act. The Graves Amendment prohibits vicarious liability against rental and leasing companies for the negligence of those who rent and lease their vehicles. "The Graves Amendment was enacted by Congress on August 10, 2005, as part of a comprehensive transportation bill entitled the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ... The [a]ct deals generally with motor vehicle safety, primarily providing billions of dollars in funding allocations for transportation projects ... The Amendment was included in the act as a tort reform measure intended to bar recovery against car rental and leasing companies on the basis of vicarious liability." (Citations omitted; internal quotation marks omitted.) *Rodriguez v. Testa,* 296 Conn. 1, 9, 993 A.2d 955 (2010). Nonetheless, a rental company may still be subject to liability for independent negligence or criminal conduct. 49 U.S.C. § 30106(a).

***15** The Graves Amendment, codified at 49 U.S.C. § 30106 with an effective date of August 10, 2005, provides, in relevant part: "An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if ... (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)."

"There are three requirements that trigger the application of the Graves Amendment ... namely; (1) the action must have commenced on or after August 10, 2005; (2) the owner of the vehicle must be engaged in the trade or business of renting or leasing motor vehicles; and (3) there is no negligence or criminal wrongdoing on the part of the vehicle owner." *Lester v. Patinkin,* Superior Court, judicial district of Ansonia–Milford, Docket No. CV–10–6002769–S (May 25, 2011, Arnold, J.).

"Recently, in *Rodriguez v. Testa,* 296 Conn. 1, 993 A.2d 955 (2010), the Supreme Court addressed whether the Graves Amendment preempts state law imposing vicarious liability on the lessor of an uninsured motor vehicle for damages caused by the negligent acts of the lessee or an agent thereof. The court held that the Graves Amendment preempted [General Statutes] § 14–154a(a), which states, in relevant part: 'Any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased, to the same extent as the operator would have been liable if he had also been the owner.' ... Furthermore, the court held that, under the facts of the case, the Amendment was constitutional as a valid exercise of Congressional authority under the commerce clause ... As a result, it affirmed the trial court's granting of the leasing company's motion for summary judgment." (Citations omitted.) *Green v. Asarisi,* Superior Court, judicial district of New Haven, Docket No. CV–09–5030275–S (September 7, 2010, Wilson, J.).

In the present case, the action commenced after August 10, 2005, and the defendants Elrac, LLC and Enterprise Rent–A–Car Company were in the trade or business of renting or leasing motor vehicles. Further, the plaintiff does not allege that the defendants engaged in any criminal wrongdoing. However, since the plaintiffs have alleged that the defendants negligently entrusted the vehicle to the defendants, Kapila and Senibaldi, and

since the defendants have challenged the legal sufficiency of that claim, the court must first determine the legal sufficiency of the negligent entrustment claim. If the court concludes that the negligent entrustment claim is legally sufficient, the defendants cannot succeed on their motion to strike on the ground that the Graves Amendment preempts the plaintiffs' vicarious liability claims against the defendants. However, if the court concludes that the negligent entrustment claim is legally insufficient then the exemption under the Graves Amendment applies, thus preempting liability and barring the vicarious liability claims against the defendants, and therefore requiring the court to strike the vicarious liability claims based on negligent entrustment. See *Angione v. Bloom,* Superior Court, judicial district of Stamford–Norwalk, Docket No. CV–08–5006850–S (October 6, 2011, Jennings, J.T.R.). See also, *DeRosa v. Evans,* Superior Court, judicial district of New Haven, Docket No. CV–10–6015111–S (October 27, 2011, Gold, J.) [52 Conn. L. Rptr. 803] (finding first that there was no genuine issue of material fact that plaintiff had not sufficiently alleged that defendant was independently negligent and concluding second, therefore, that Graves Amendment applied).

B

Negligent Entrustment

***16** The Connecticut Supreme Court first recognized a cause of action for negligent entrustment of an automobile in *Greeley v. Cunningham,* 116 Conn. 515, 165 A. 678 (1933). In *Greeley,* the plaintiff brought a claim that the owner of a vehicle was negligent when he entrusted a vehicle to a driver who, in turn, was in the process of preparing to take a driver's licensing examination. First, the court recognized that "[a]n automobile, while capable of doing great injury when not properly operated upon the highways, is not an intrinsically dangerous instrumentality to be classed with ferocious animals or high explosives ... and liability cannot be imposed upon an owner merely because he entrusts it to another to drive upon the highways." (Citations omitted.) *Id.,* at 518. The court further stated that "[i]t is ... coming to be generally held that the owner may be liable for injury resulting from the operation of an automobile he loans to another, when he knows or ought reasonably to know that the one to whom he entrusts it is so incompetent to operate it, by reason of inexperience or other cause, that the owner ought reasonably to anticipate the likelihood that in its operation injury will be done to others." *Id.* As a result, the court concluded that "[w]hen the evidence proves that the owner of an automobile knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought reasonably to anticipate the likelihood of injury to others by reason of that incompetence, and such incompetence does result in such injury, a basis of recovery by the person injured is established. That recovery rests primarily upon the negligence of the owner in entrusting the automobile to the incompetent driver." *Id.,* at 520.

Superior Courts have observed that "on the appellate level, the doctrine of negligent entrustment has not developed beyond that which was announced in *Greeley.*" (Internal quotation marks omitted.) *Marron v. Grala,* Superior Court, judicial district of New Britain, Docket No. CV–12–6016399–S (January 2, 2013, Shorthall, J.); *Angione v. Bloom,* Superior Court, judicial district of Stamford–Norwalk, Docket No. CV–08–5006850–S (October 6, 2011, Adams, J.T.R.); *Snell v. Norwalk Yellow Cab, Inc.,* Superior Court, judicial district of Stamford–Norwalk, Docket No. CV–10–013455–S (May 24, 2011, Jennings, J.T.R.) (52 Conn. L. Rptr. 43, 47). Nevertheless, a number of courts have summarized the law of negligent entrustment of an automobile as follows: "The essential elements of the tort of negligent entrustment of an automobile [are] that the entrustor knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought to reasonably anticipate the likelihood of injury to others by reasons of that incompetence, and such incompetence does result in injury ... Liability cannot be imposed on a defendant under a theory of negligent entrustment simply because the defendant permitted another person to operate the motor vehicle ... Liability can only be imposed if (1) there is actual or constructive knowledge that the person to whom the automobile is loaned is incompetent to operate the motor vehicle; and (2) the injury resulted from that incompetence."[4] (Internal quotation marks omitted.) *Ellis v. Jarmin,* Superior Court, judicial district of New London, Docket No. CV–09 5010839–S (December 17, 2009, Cosgrove, J.) (49 Conn. L. Rptr. 1, 2); *Kaminsky v. Scoopo,* Superior Court, judicial district of New Haven, Docket No. CV–08–6002084–S (July 30, 2008, Bellis, J.) (46 Conn. L. Rptr. 82, 82–83); *Griffin v. Larson,* Superior Court, judicial district of Ansonia–Milford at Derby,

Docket No. CV–02–0079364–S (August 18, 2004, Lager, J.).

***17** Superior Courts have opined "that the negligence of the incompetent driver is not the determinative factor in a negligent entrustment action, rather, the core of a negligent entrustment action is whether *the entrustor was negligent* in supplying a vehicle to the incompetent driver." (Emphasis added.) *Chung v. Place Motors, Inc.,* Superior Court, judicial district of New London, Docket No. 560074 (February 11, 2003, Hurley, J.T.R.) (34 Conn. L. Rptr. 140, 142), citing, *McKee v. Robinson,* Superior Court, judicial district of New London at Norwich, Docket No. 091410 (November 30, 1989, Austin, J.) (1 Conn. L. Rptr. 68, 69); see also *Dervil v. Perez,* Superior Court, judicial district of Stamford–Norwalk, Docket No. CV–04–4001545–S (September 12, 2005, Lewis, J.T.R.). Thus, "a principal feature of a cause of action for negligent entrustment is the knowledge of the entrustor with respect to the dangerous propensities and incompetency of the entrustee." (Internal quotation marks omitted.) *Morin v. Machrone,* Superior Court, judicial district of Litchfield, Docket No. CV 10 6003593 (May 20, 2011, Roche, J.).

Knowledge of the entrustor may take the form of "actual" or "constructive" knowledge. "Actual knowledge" is based on incompetency or a failure to appreciate some visible or demonstrable impairment at the time of rental, whereas "constructive knowledge" of a renter's driving "incompetence" is based on facts that are openly apparent and readily discernible. *Hall v. CAMRAC, LLC,* Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04–CV–12–6027530–S (December 10, 2013, Sheridan, J.) (57 Conn. L. Rptr. 262). Accordingly, courts have found negligent entrustment claims to be legally insufficient if the complaint failed to allege any facts as to the knowledge of whether the driver was incompetent. See *Dervil v. Perez, supra,* Superior Court, Docket No. CV–04–4001545–S (court granted motion to strike where complaint alleged defendant knew or should have known that driver was incompetent reckless driver and would get involved in an accident, but did not allege "any facts suggesting that the defendant owner had actual or constructive knowledge of the defendant driver's dangerous propensities"); *Chung v. Place Motors, Inc., supra,* 34 Conn. L. Rptr. at 142 (court granted motion to strike because complaint failed to adequately plead facts sufficient to find knowledge of the entrustee's incompetence); *Plimpton v. Amerada Hess Corp.,* Superior Court, judicial district of Stamford–Norwalk, Docket No. 99–01–69861–S (September 27, 1999, Karazin, J.) (granting motion to strike because complaint failed to allege that driver had any dangerous propensities, or that defendant had actual or constructive knowledge of any dangerous propensities of the driver).

The defendants argue that the plaintiffs have not alleged any sufficient facts as to either actual or constructive knowledge that the person to whom the motor vehicle was loaned is incompetent. In particular, the defendants argue "constructive knowledge" can only arise out of facts that are readily apparent at the time of the rental, and not out of any duty to investigate an entrustee's background or history. The defendants refer, in particular, to the plaintiffs' allegation that Enterprise would have known of Kapila, Anderson, or Senibaldi's incompetence if they had conducted an investigation into their backgrounds and history. Based on this allegation, the defendants argue that because no such duty exists, the plaintiffs' negligent entrustment claim is legally insufficient.

***18** This court has previously determined whether a rental car company has such a duty in *Short v. Ross, supra,* 55 Conn. L. Rptr. at 673. In *Short,* the plaintiff sued the renter and the rental company for damages arising out of an automobile-pedestrian accident that occurred at a football game. The plaintiff was a pedestrian located within the tailgating area of the football game. The renter drove a U–Haul box truck into the tailgating area and collided with several pedestrians and vehicles, including the plaintiff, causing the plaintiff various and severe injuries. The rental company argued that it did not have a legal duty to investigate a potential renter's driving history, and instead was required by statute to only ensure that the potential renter possessed a valid driver's license. The plaintiff countered that the allegations pleaded did not posit liability based on a failure by the rental company to investigate the renter's driving history but, instead, were based on the rental company's knowledge of facts concerning the renter's proposed use of the vehicle and, as a result of that knowledge, the rental company should not have rented the truck to the renter at all. In deciding whether the rental company had a legal duty to investigate the prospective renter's history, the court acknowledged that the precise duty imposed by law upon a rental company is an issue that has not been addressed by our Appellate Court and turned to *Chapman v. Herren,* Superior Court, judicial district of New London, Docket

No. CV–07–5005067–S (June 24, 2010, Cosgrove, J.) (50 Conn. L. Rptr. 228).

In *Chapman,* the court addressed whether a rental car company had a duty to investigate a prospective renter's driving record when that renter had presented a valid driver's license. There, the plaintiff argued that *Greeley* imposed a duty on an entrustor to investigate an entrustee's driving history. The court disagreed, stating "[w]hile *Greeley* undoubtedly recognizes the validity of a negligent entrustment cause of action, it cannot be said that the case recognizes or creates a legal duty upon rental car companies to investigate a renter's driving record." *Chapman v. Herren, supra,* 50 Conn. L. Rptr. at 232. The court looked to current legislation, specifically General Statutes § 14–153 and explained: "[O]ur legislature has already enacted a statutory scheme governing the requirements of rental car companies. [Section] 14–153 provides, in relevant part, that '[a]ny person, firm or corporation which rents a motor vehicle ... shall inspect or cause to be inspected the motor vehicle operator's license of the person initially operating such motor vehicle, [and] shall compare the signature on such license with that of the alleged licensee written in his presence ...' Under this statute, a rental car company is not required to investigate a potential renter's driving record; rather, the rental car company must only assess the facial validity [of] a driver's license before renting to that driver. The legislature could have mandated that rental car companies run driving record reports if it intended that such a duty [should] exist.

***19** "Here, legislation exists at both the federal and the state level regulating the rental car industry. This makes for a difficult arena for the court to impose a duty where there is silence in the statutory scheme ... However, given the legislative silence and the absence of case law imposing an obligation on rental car companies to investigate renters' driving records, this court cannot find that rental car companies have a legal duty to investigate renters' driving records." (Citations omitted; internal quotation marks omitted.) *Id.,* at 232–33. The court in *Short,* based on this approach, agreed with the defendant that aside from a rental company's obligation to check the renter's driver's license, Connecticut does not impose a duty upon a rental company to investigate a prospective renter's driving history, proposed usage of a rental vehicle, or the lessee's criminal background. *Short v. Ross, supra,* 55 Conn. L. Rptr. at 674.

Other Superior Court decisions have affirmed that there is no legal duty imposed upon a rental company to investigate a prospective renter's driving history and at minimum, a rental company is only obligated to check the renter's driver's license. *Hall v. CAMRAC, LLC, supra,* 57 Conn. L. Rptr. at 262; *DeRosa v. Evans,* Superior Court, judicial district of New Haven, Docket No. CV–10–6015111–S (October 27, 2011, Gold, J.) (52 Conn. L. Rptr. 803, 804); *Donnelly v. Rental Car Finance Corp.,* Superior Court, judicial district of Hartford, Docket No. CV–10–6016545–S (May 17, 2011, Wagner, J.T.R.) (51 Conn. L. Rptr. 899, 900); *Hollis v. Alamo Financing, LP,* Superior Court, judicial district of Hartford, Docket No. CV–08–5024043–S (February 4, 2011, Robaina, J.) (51 Conn. L. Rptr. 434, 436–37). As one court stated: "[I]t appears that an action for negligent entrustment may be pursued against a rental car company in some circumstances. A rental company is under a duty to check the potential customer's driver's license to ensure that it is facially valid and determine whether facts readily available to them might indicate unfitness to drive. While it does not appear that a rental company is under any obligation to perform more stringent screening procedures, such as requesting driving records or conducting criminal record searches, allegations that a rental company had information readily available to it that would have disclosed that the driver was incompetent to drive may be enough to survive a motion to strike." *Donnelly v. Rental Car Finance Corp., supra,* at 900.

Having determined that a rental car company is under a duty to check the prospective renter's driver's license to ensure that it is facially valid, the court must look to the plaintiffs' complaint to determine whether they have alleged any allegations as to this duty. In subparagraph 15(v) of count six, the plaintiffs allege: "The [defendants] ... failed to require the defendant Tresor Kapila, Jamal Anderson and/or [defendant] Dina Senibaldi to produce a valid motor vehicle operator's license at the time of the rental nor preserve any copy thereof." In subparagraph 15(t), the plaintiffs allege: "The [defendants] ... failed to require proof of a valid driver's license beyond that such supposed driver's license presented 'appear' to be valid upon its face under a policy of 'willful blindness' to the qualifications of the automobile renters." In subparagraph 15(r), the plaintiffs allege in relevant part: "The [defendants] ... failed to consult ... the validity of the driver's operator's

license ...” In subparagraph 15(ac), the plaintiffs allege: “The [defendants] knew or should have known that the defendant, Tresor Kapila, was renting the vehicle for an unqualified and/or *unlicensed* driver.” (Emphasis added.) In subparagraph 15(ad), the plaintiffs allege: “The [defendants] failed to require the defendant Tresor Kapila, Jamal Anderson, and or the Defendant Dina Senibaldi to produce corroboration of their operator's license identity at the time of their respective rentals nor preserve a copy thereof.” These allegations all pertain to the defendants' alleged failure to check the potential customer's driver's license to ensure that it was facially valid, and are therefore enough to survive a motion to strike the negligent entrustment claim.

***20** The defendants also argue that the claim is legally insufficient because the plaintiffs have failed to state sufficient facts as to incompetency. This argument is misplaced. The defendant's argument attempts to treat a rental company's duty to check the potential customer's driver's license to ensure that it is facially valid separate and apart from allegations pertaining to a driver's incompetency. As stated, knowledge that a prospective renter is “incompetent” may arise from either “actual” or “constructive” knowledge. Although “actual” knowledge may pertain to obvious signs, such as physical impairment or anything else in the conduct/behavior of the prospective rentor, “constructive” knowledge as to a driver's incompetency may arise from a facially defective or deceptive driver's license. Essentially, the underlying rationale for ensuring that a driver's license is facially valid is to determine whether there are any “red flags” or facts readily available to the rental company that might indicate an unfitness to drive. *DeRosa v. Evans,* Superior Court, judicial district of New Haven, Docket No. CV–10–6015111–S (October 27, 2011, Gold, J.) (“the plaintiff has failed to provide the court with any legal authority which would require a rental car company to investigate a potential lessee's driving record, and has failed even to allege that at the time of the vehicle's rental there existed anything in Evans' conduct or behavior, or in the documents she provided the defendant, *that would have raised 'red flags' or otherwise reasonably caused the defendant to screen her qualifications* ” [emphasis added]). Thus, it follows that allegations of a facially defective or deceptive license, or in this case a lack thereof, is sufficient enough for purposes of alleging “constructive” knowledge of the renter's incompetency. Indeed, the defendants state in their memorandum of law that “Connecticut trial court judges have required pleadings to specify particular conduct on the part of the prospective renter or *deficiencies in the documentation* presented at the time of the rental that would alert the rental car company as to potential incompetencies.” (Emphasis added.) As stated in the preceding paragraph, the plaintiffs have set forth allegations as to deficiencies in the documentation by specifically alleging that the proper documentation was never provided. These allegations all pertain to constructive knowledge of the prospective renter's “potential incompetencies,” and are therefore enough to survive a motion to strike the negligent entrustment claim.

Accordingly, because the plaintiffs set forth allegations pertaining to the defendants' alleged failure to check the potential customer's driver's license to ensure that it is facially valid, the claim for negligent entrustment is legally sufficient. The defendants' motion to strike paragraphs 15(a)–15(c), 15(h)–15(n), 15(r)–15(v), 15(z)–15(ad) and 15(ag) of count six of the plaintiffs' complaint is denied.

***21** The defendants also move to strike subparagraphs 15(d)–15(g), 15(p)–15(r), 15(x)–15(z), 15(af)–15(ag) of the seventh count on the ground that said subparagraphs insufficiently allege negligence theories within the negligent entrustment count. They contend that because the seventh count contains “mixed predicates” for two causes of action, negligent entrustment and negligence, the paragraphs alleging a negligent claim must be stricken on this basis alone. Unlike their argument that the subparagraphs in count six insufficiently allege a negligent entrustment claim, the defendants are not seeking to strike the subparagraphs in count seven on the basis that the paragraphs insufficiently allege a negligence claim. The court, therefore, will not address whether the facts alleged in subparagraphs 15(d)–15(g), 15(p)–15(r), 15(x)–15(z), 15(af)–15(ag) of the seventh count sufficiently set forth a negligence claim. Since the court has previously determined that a request to revise would have been more appropriate and that the defendants have abandoned their arguments in this regard, the defendants' motion to strike subparagraphs 15(d)–15(g), 15(p)–15(r), 15(x)–15(z), 15(af)–15(ag) of the seventh count is denied.

IV

SEVENTH COUNT

The defendants move to strike count seven on the ground that the plaintiffs have not sufficiently alleged a claim for negligent entrustment. The defendants incorporate their argument raised in striking paragraphs 15(a)–15(c), 15(h)–15(n), 15(r)–15(v), 15(z)–15(ad) and 15(ag) of count six in its entirety.

As previously discussed in section IIIB of this opinion, the court has determined that a rental car company is under a duty to check the prospective renter's driver's license to ensure that it is facially valid. Although the defendants incorporate their argument for striking paragraphs 15(a)–15(c), 15(h)–15(n), 15(r)–15(v), 15(z)–15(ad) and 15(ag) of count six, and because the allegations are numbered slightly different under count seven and there are additional allegations provided in count seven that are not provided in paragraphs 15(a)–15(c), 15(h)–15(n), 15(r)–15(v), 15(z)–15(ad) and 15(ag) of count six, the court will turn to the specific allegations provided in count seven.

The plaintiffs incorporate paragraph 5(f) of count four into count seven, which states: "The defendant, Tresor Kapila, allowed his name to be used for the rental transaction but it appears that he was not present at the time the 2010 Dodge Avenger was relinquished at the Manchester Enterprise Terminal because he did not sign the March 25, 2011 rental agreement and no copy of a facial valid license was retained." The plaintiff further alleges in paragraph 15(k) of count seven that the defendant failed "to determine that the defendant, Tresor Kapila, Jamal Anderson and/or the defendant Dina Senibaldi were unlicensed drivers prior to the April 8, 2011 collision." In 15(s), the plaintiffs allege "the defendants ... failed to consult or disregarded sources including data bases concerning the validity of the renter's license ..." In paragraph 15(w), the plaintiffs allege "the defendant[s] ... failed to require the defendant Tresor Kapila, Jamal Anderson and/or the defendant Dina Senibaldi to produce a valid motor vehicle operator's license at the time of the rental nor preserve a copy thereof." These allegations all pertain to the defendants' alleged failure to check the potential customer's driver's license to ensure that it was facially valid, and are therefore enough to survive a motion to strike the negligent entrustment claim. [5]

***22** Regarding the defendants' remaining argument, whether the negligent entrustment claim is legally insufficient because the plaintiffs have failed to state sufficient facts as to incompetency, the court adopts its discussion and analysis set forth in section IIIB of this opinion. The court therefore denies the defendants' motion to strike count seven.

CONCLUSION

For the foregoing reasons, the defendants' motion to strike count three and paragraph 10, which defendants refer to as paragraph 21 in counts six and seven is granted. The defendants' motion to strike paragraphs 15(a)–15(c), 15(h)–15(n), 15(r)–15(v), 15(z)–15(ad) and 15(ag) in count six, and 15(d)–15(g), 15(p)–15(r), 15(x)–15(z), 15(af)–15(ag) in count seven is denied, and the defendants' motion to strike count seven is denied. Further, since the plaintiffs' claim for negligent entrustment is legally sufficient the Graves Amendment does not apply to bar the plaintiffs' vicarious liability claims.

All Citations

Not Reported in A.3d, 2014 WL 5394924

Footnotes

1 It is important to note that pending before our Supreme Court is the issue of whether Connecticut should recognize a claim for parental loss of consortium in the case of *Campos v. Coleman,* (SC 19195), Superior Court, judicial district of New Haven at New Haven, Docket No. CV 10 6009582 (June 9, 2010, Wilson, J.), (trial court granted defendants' motion to strike counts alleging minor children's claim for parental loss of consortium because parental loss of consortium is not a recognized cause of action in Connecticut).

2 The defendants also argue that the plaintiff Nicholas Davis cannot recover consequential damages because it is not a legally recognized cause of action. Contrary to the defendants' assertions, a claim for consequential damages is a legally recognized cause of action in the state of Connecticut. Whether it should extend to the facts of this case is a separate question that will be addressed, *infra.*

3 The analysis here is based on the notion that the plaintiff Nicholas Davis is bringing this claim on his own behalf. It is possible, because the father, Edmund Davis, is also a plaintiff to this action that he may be seeking damages on his son's behalf. Regardless, even if the plaintiff Edmund Davis were making such an argument, it is without merit. As stated, parents are allowed to bring a claim for consequential damages for expenses that they incur as a result of personal injuries sustained by a *minor* child as a result of a negligent act of a third party. As discussed, *supra,* the cause of action does not extend to a parent bringing a claim on behalf of an adult child who has not been injured due to a negligent act and has incurred expenses due to the parent being injured by a negligent third party.

4 "[T]he Supreme Court's decision in *Greeley* 'virtually adopted' the position subsequently taken by Restatement (Second) of Torts, which provides as follows: 'One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.' 2 Restatement (Second), Torts § 390, p. 314 (1965)." (Internal quotation marks omitted.) *Snell v. Norwalk Yellow Cab, Inc., supra,* 52 Conn. L. Rptr. at 47.

5 In their memorandum, the defendants incorporate the arguments they presented with regard to the paragraphs contained within counts six and seven. In their argument to strike certain paragraphs within count six, the defendants also set forth an argument that the plaintiffs failed to allege that there was a causal connection between Kapila, Anderson and/or Senibaldi's alleged incapacity and the plaintiff's injuries. This argument was not addressed in the defendants' memorandum as a ground for striking count seven in its entirety. The defendants state in their memorandum "the plaintiff's negligent entrustment claim is legally insufficient as a matter of law because the defendant lessors have no duty to investigate a lessee's driving, criminal or other history and because they fails to state sufficient facts of incompentency." There is no mention of the causation element. Therefore, the court will consider that argument abandoned and will not address whether count seven sufficiently pleads the causation element. The court will refer to the defendants' arguments raised in support of striking the negligent entrustment allegations in count six to the extent that they relate to duty and incompetency.

2011 WL 2479693
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Richard GILLAND, Jr., Administrator et al.
v.
SPORTSMEN'S OUTPOST, INC. et al.

No. X04CV095032765S.
|
May 26, 2011.

Synopsis

Background: Administrator of deceased victim's estate brought action against sporting goods store where handgun and ammunition used to kill victim was stolen, alleging negligence, wrongful death, negligent infliction of emotional distress, bystander emotional distress, and negligent and reckless entrustment. Defendant moved to dismiss.

Holdings: The Superior Court, Judicial District of Hartford, Robert B. Shapiro, J., held that:

[1] store was not required to comply with statutes regarding the sale, delivery, or transfer of guns in connection with an incident in which a gun and ammunition were stolen from the store;

[2] store's alleged 24-hour delay in reporting gun theft was too attenuated from the victim's shooting to be a substantial factor in bringing about the injuries claimed;

[3] store did not negligently entrust gun and ammunition to individual;

[4] estate of shooting victim lacked standing to raise constitutional challenge to the federal Protection of Lawful Commerce in Arms Act (PLCAA) under the Tenth Amendment;

[5] PLCAA did not violate the doctrine of separation of powers;

[6] PLCAA did not violate due process clause;

[7] PLCAA did not violate equal protection clause; and

[8] PLCAA did not violate First Amendment right to access courts.

Motion granted.

Opinion

ROBERT B. SHAPIRO, Judge.

***1** On March 7, 2011, the court heard oral argument concerning the defendants Sportsmen's Outpost, Inc.'s (Sportsmen's Outpost) and Michael Cortigliano, Jr.'s (Cortigliano) (collectively, defendants) motion to dismiss and/or strike the plaintiffs' second amended complaint (# 114) (complaint). After considering the parties' written submissions and oral arguments, the court issues this memorandum of decision.

I

Background

As discussed below, in the complaint, the plaintiffs allege that, on August 23, 2007, Scott Magnano assaulted and abducted Jennifer Magnano and then shot and killed her with a Glock 21 handgun (Glock) and ammunition. The plaintiffs allege that the Glock and ammunition had been removed from Sportsmen's Outpost, a federally licensed firearms dealer, located in Wolcott, Connecticut, more than five weeks earlier, on July 15, 2007. See complaint, ¶¶ 21–22.

The plaintiffs in this matter are Richard Gilland, Jr., as administrator of the estate of Jennifer Magnano; Steven R. Dembo, as guardian for David Magnano and Emily Magnano (n/k/a Emily Thibeault), the minor children of Jennifer Magnano; and Jessica Rosenbeck, the adult child of Jennifer Magnano. The defendants are Sportsmen's Outpost and Cortigliano.

In the complaint, the plaintiffs base their claims against Sportsmen's Outpost and Cortigliano, respectively, on negligence (Counts One and Two); wrongful death

(Counts Three and Four); negligence, seeking to recover for pain, suffering and emotional distress suffered by Jennifer Magnano in the interval between being attacked and her death (Counts Five and Six); negligent infliction of emotional distress (Counts Seven and Eight); bystander emotional distress (Counts Nine and Ten); and negligent and reckless entrustment (alleged against Sportsmen's Outpost only in Count Eleven). All of these counts stem from the same nucleus of alleged facts.

The plaintiffs allege that Sportsmen's Outpost was and is engaged in the business of selling firearms to the public and that it, "and its agents and employees were subject to the various state and federal laws regulating all aspects of the firearms industry, including, but not limited to the Federal Gun Control Act." See complaint, ¶¶ 7, 9.

The plaintiffs allege that Scott Magnano first went to Sportsmen's Outpost on July 13, 2007, and that, "[d]uring the ensuing police investigation into the theft," see complaint, paragraph 19, Cortigliano identified him as a "suspicious customer" who came to the store that day. See complaint, ¶¶ 16–19.

They further allege that an individual, later identified as Scott Magnano, entered Sportsmen's Outpost two days later, on July 15, 2007, and was provided multiple handguns, including the Glock, and corresponding ammunition, by William Christman (Christman), an employee. See complaint, ¶¶ 12, 19. They allege that "Christman failed to request from the individual personal identification or a state issued firearms permit." See complaint, ¶ 13.

***2** In paragraph 14, the plaintiffs allege that "Christman left the individual, who was the only customer in the store, unattended and alone with the firearms and ammunition. As a result, this individual removed from Sportsmen's Outpost the unattended and unsecured Glock 21 handgun and a corresponding 14 bullet magazine."

In paragraph 15, they allege that, immediately thereafter, Christman informed Cortigliano that the Glock and ammunition had been stolen, and, despite this knowledge, the defendants failed to notify police about the theft for approximately three days. They further allege that, at the time he went to Sportsmen's Outpost, Scott Magnano was the subject of a Connecticut restraining or protective order and a foreign order of protection. See complaint, ¶ 20.

In paragraph 21, the plaintiffs allege that Scott Magnano came to Jennifer Magnano's home on August 23, 2007, struck her on the head with the Glock, and then abducted her at gunpoint in front of her children, David Magnano and Emily Thibeault. The plaintiffs allege also that Scott Magnano shot and killed Jennifer Magnano on the same day, with the Glock and ammunition which had been removed from Sportsmen's Outpost on July 15, 2007. See complaint, ¶ 22. The plaintiffs also allege that, as a result of the defendants' conduct, Jennifer Magnano died and her children suffered severe emotional distress.

Additional references to the plaintiffs' allegations are set forth below.

In support of their motion to dismiss, the defendants assert that this action is barred by the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 et seq. (PLCAA), and dismissal is required. In addition, they claim that certain counts should be stricken as legally insufficient.

In response, the plaintiffs assert that the PLCAA does not bar their case, as it falls within more than one exception under the PLCAA, and is not a "qualified civil liability action" that is subject to dismissal. See 15 U.S.C. § 7903(5)(A). They also contend that, even if this is a qualified action barred by the PLCAA, the PLCAA is unconstitutional as applied to this case. They also argue, in opposition to the defendants' other legal challenges, that they properly have pleaded their causes of action.

After the plaintiffs challenged the constitutionality of the PLCAA, the court granted the United States of America's (Government) motion to intervene, concerning the constitutionality of the PLCAA.

II

Standard Of Review

"[The motion to dismiss] shall always be filed with a supporting memorandum of law, and where appropriate, with supporting affidavits as to facts not apparent on the record." See Practice Book § 10–31(a).

"Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." (Internal quotation marks omitted.) *Statewide Grievance Committee v. Rozbicki,* 211 Conn. 232, 245, 558 A.2d 986 (1989). The Supreme Court has termed this "fundamental principle" the " 'jurisdiction first' rule. Once the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented ... The court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *St. Paul Travelers Companies, Inc. v. Kuehl,* 299 Conn. 800, 816, 12 A.3d 852 (2011).

***3** "[T]rial courts addressing motions to dismiss for lack of subject matter jurisdiction ... may encounter different situations, depending on the status of the record in the case ... [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts ... Different rules and procedures will apply, depending on the state of the record at the time the motion is filed.

'When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader ... In contrast, if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss ... the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint ... Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts] ... If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counter affidavits ... or other evidence, the trial court may dismiss the action without further proceedings ... If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations ... or only evidence that fails to call those allegations into question ... the plaintiff need not supply counter affidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein ... Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Columbia Air Services, Inc. v. Dept. of Transportation,* 293 Conn. 342, 347–48, 977 A.2d 636 (2009).

Here, no affidavits were presented. There are no disputed facts. "[T]he motion to dismiss ... admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold v. Rowland,* 296 Conn. 186, 201, 994 A.2d 106 (2010). No evidentiary hearing need be held on a motion to dismiss where there is no genuine issue as to a material fact. See *Standard Tallow Corp. v. Jowdy,* 190 Conn. 48, 56, 459 A.2d 503 (1983). As discussed below, the court decides the motion on the basis of the allegations in the complaint.

III

Discussion

A

Claims Against Sportsmen's Outpost

1. Predicate Exception To The PLCAA

***4** As stated above, the defendants' motion to dismiss is premised on the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03 ("PLCAA"), which prohibits bringing, in any federal or state court, certain civil actions against manufacturers or sellers of firearms distributed in interstate or foreign commerce.

In response, the plaintiffs assert that their claims come within the exceptions to the PLCAA or that it does not apply to the facts alleged. In the alternative, they challenge the constitutionality of the PLCAA.

The "court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *Luurtsema v. Commissioner of Correction,* 299 Conn. 740, 752, 12 A.3d 817 (2011). Accordingly, the court first considers the applicability of the PLCAA and exceptions thereto.

The PLCAA prohibits the commencement of a "qualified civil liability action" in any state or federal court. See 15 U.S.C. § 7902(a). Where the PLCAA bars the action, dismissal is required. See *City of New York v. Beretta U.S.A. Corp.,* 524 F.3d 384, 395, 404 (2d Cir.2008), cert. denied, —— U.S. ——, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009). [1]

A "qualified civil liability action" is defined as "a civil action ... brought by any person against a manufacturer or seller of a [firearm or ammunition that has been shipped or transported in interstate or foreign commerce] ... for damages, ... or other relief resulting from the criminal or unlawful misuse of [the firearm] by the person or a third party ..." See 15 U.S.C. § 7903(5)(A). A "seller" includes licensed dealers and importers and persons engaged in the business of selling ammunition. See 15 U.S.C. § 7903(6).

"Congress enacted the PLCAA in response to '[l]awsuits ... commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.' [15 U.S.C.] § 7901(a)(3). Congress found that manufacturers and sellers of firearms 'are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.' [15 U.S .C.] § 7901(a)(5). Congress found egregious '[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others.' [15 U.S.C.] § 7901(a)(6). Indeed, the PLCAA's stated primary purpose is

> [t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

[15 U.S.C.] § 7901(b)(1).

"The PLCAA provides for six exceptions to the definition of a 'qualified civil liability action.' See [15 U.S.C.] § 7903(5)(A)(i)-(vi). Most relevant to this case, a qualified civil liability action 'shall not include ... an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute *applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm* for which relief is sought.' [15 U.S.C.] § 7903(5)(A)(iii). This is known as the 'predicate exception.' " (Emphasis added.) *Estate of Charlot v. Bushmaster Firearms, Inc.,* 628 F.Sup.2d 174, 180 (D.D.C.2009). [2]

***5** "The predicate exception was meant to apply only to statutes that actually regulate the firearms industry ..." *City of New York v. Beretta U.S.A. Corp., supra,* 524 F.3d at 404. "[S]tatutory exceptions are to be construed narrowly in order to preserve the primary operation of the [general rule]." (Internal quotation marks omitted.) *Id.,* at 403.

The court addresses below the statutory violations which the plaintiffs allege in their complaint are applicable here. [3]

(a)

18 U.S.C. § 922(b)(2) and General Statutes §§ 29–31, 29–33, and 29–361: Sell, Deliver or Transfer

[1] The plaintiffs allege that Sportsmen's Outpost knowingly violated 18 U.S.C. § 922(b)(2) and General Statutes §§ 29–31, 29–33 and 29–361. See complaint, ¶ 26f. These statutes pertain to the sale, delivery, or transfer of firearms. The defendants contend that, since the plaintiffs allege that Scott Magnano stole the Glock, these statutes are not applicable here, and Sportsmen's Outpost was not required to comply with their requirements, which include, for example, as discussed below, a written application and background check (§ 29–33(c)) and obtaining evidence of identity (§ 29–31).

18 U.S.C. § 922(b)(2) provides, in relevant part, that "[i]t shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector *to sell or deliver* ... any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance[.]" (Emphasis added.) Thus, violation of this federal statute is based on a violation of State law.

General Statutes § 29–31 pertains to display of permits to sell and records of sales of pistols and revolvers.[4] General Statutes § 29–33 pertains to the sale, delivery, or transfer of pistols and revolvers.[5] General Statutes § 29–361 pertains to verification of eligibility of persons to receive or possess firearms; the State database; the instant criminal background check, and related issues. Like the other Connecticut statutes referred to above, its provisions relate to the sale, delivery or transfer of firearms.[6]

The plaintiffs argue that these cited statutes are applicable here since they are not limited to the sale of a firearm, but also concern "delivery" or "transfer" of a firearm. They contend that an intentional transfer is not required, nor is a transfer of title.[7]

"With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule ... because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit ... Moreover, it is well settled that [t]he decisions of the Second Circuit Court of Appeals carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state courts ... Accordingly, our analysis of the pertinent federal [provision] begins with the plain meaning of the statute ... If the meaning of the text is not plain, however, we must look to the statute as a whole and construct an interpretation that comports with its primary purpose and does not lead to anomalous or unreasonable results." (Citations omitted; internal quotation marks omitted.) *Rodriquez v. Testa,* 296 Conn. 1, 11, 993 A.2d 955 (2010).

***6** In addition, the meaning of a word may vary depending on the context of its usage. "As Justice Holmes wrote, '[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' *Towne v. Eisner,* 245 U.S. 418, 425, 38 S.Ct. 158, 62 L.Ed. 372 (1918)." *Dewitt v. John Hancock Mutual Life Insurance Co.,* 5 Conn.App. 590, 594, 501 A.2d 768 (1985). By its definition, a word may imply "an allowance for some degree of difference depending on the 'thing' involved. It [may] suggest ... as well, a sense of compatibility with the context of its referent as that may be. Its flavor of relativity, depending on the circumstances of its usage, implies some leeway within permissible limits." *Builders Service Corp. v. Planning and Zoning Commission,* 208 Conn. 267, 277, 545 A.2d 530 (1988).

"[A]ny word in the English language—except for words of specialized contexts, such as mathematics or science—will ordinarily have multiple meanings, depending on the context in which it has been used." *Community Renewal Team, Inc. v. United States Liability Insurance Co.,* 128 Conn.App. 174, 180 (2011).

In their complaint, the plaintiffs allege that the Glock and ammunition were taken by Scott Magnano from Sportsmen's Outpost as a result of being left unattended. In paragraphs 12 and 14, they allege that Christman, an employee, provided multiple handguns and ammunition to the man who entered Sportsmen's Outpost on July 15, 2007. See complaint, ¶ 12. In paragraph 14, they allege, "Christman left the individual, who was the only customer in the store, unattended and alone with the firearms and ammunition. As a result, this individual removed from Sportsmen's Outpost the unattended and unsecured Glock 21 handgun and a corresponding 14 bullet magazine."

They further allege, in paragraph 15, that "[i]mmediately thereafter," Christman informed Cortigliano "that the Glock 21 and ammunition had been stolen." In paragraphs 15–16, they allege that the defendants reported "the theft." In paragraph 19, they allege that, "[d]uring the ensuing police investigation into the theft," Cortigliano identified Scott Magnano as the person who "took the Glock 21 and its corresponding ammunition" on July 15, 2007.

The decisional law cited by the plaintiffs in this part of their argument, *United States v. Monteleone,* 77 F.3d 1086 (8th Cir.1996), does not provide support for their position that a transfer or delivery is alleged, triggering the obligation to comply with the statutes upon which they premise this part of their arguments. There, in violation of 18 U.S.C. § 922(d), under which it is illegal to "sell or otherwise dispose" of a firearm to a convicted felon, an individual, Monteleone, voluntarily provided a firearm to Brown, a convicted felon, in order to have it repaired. See *id.,* at 77 F.3d 1088.

***7** The court affirmed the district court's jury instruction, which informed the jury that, as used in the indictment, "the term 'dispose of' ... means to transfer a firearm so that the transferee acquires possession of the firearm." (Internal quotation marks omitted.) *Id.,* at 1092. "This definition still requires a voluntary act by the 'transferor' to turn over the firearm to the transferee, as opposed to a nonconsensual taking by the 'transferee.' To the extent that plaintiffs' argument requires the conclusion that a gun shop is required to perform a background check or complete a federal firearms form before having a gun stolen, [the court] cannot agree." *Estate of Kim v. Coxe,* Alaska Superior Court, First Judicial District at Juneau, Case No. 1JU–08–761 CI (October 7, 2010, Pallenberg, J.), pp. 9–10 of 21 (discussing *United States v. Monteleone, supra*).

This understanding of the meaning of "transfer" is consistent with the U.S. Supreme Court's interpretation of 18 U.S.C. § 922(a)(6), in *Huddleston v. United States,* 415 U.S. 814, 823, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974), determining that pawnshop firearm redemptions are covered by that statute: " '[A]cquisition' and 'sale or other disposition' are correlatives. It is reasonable to conclude that a pawnbroker might 'dispose' of a firearm through a redemptive transaction." A taking without permission as a result of leaving a firearm and ammunition unattended markedly differs from a business transaction.

Similarly, although the plaintiffs allege, in paragraph 12, that Christman "delivered" the guns, "delivery" has been found to have a meaning equivalent to transfer. "To deliver is to give or transfer, to yield possession or control of, to hand over ... It is the physical act of transferring possession." (Citation omitted .) *Koval v. Liquor Control Commission,* 149 Conn. 63, 65, 175 A.2d 358 (1961).

ATF[8] Ruling 2010–1 (Ruling), cited by the plaintiffs, also is consistent with this understanding of "transfer." Its topic is the temporary assignment of a firearm by a federal firearms licensee to others, such as a consultant, not theft of a firearm. In that context, the ATF stated, at page 2, "A 'transfer' includes any change in dominion or control of a firearm, whether temporary or permanent, commercial or noncommercial. A change in dominion or control may occur even when such change does not convey title to the firearm.

'Businesses carry out operations through their employees. When [a licensee] temporarily assigns a firearm to an employee for bona fide business purposes, title and control of the firearm remain with the licensee." In its holding, the Ruling states, at page 3, that "[t]he temporary assignment of a firearm by [a licensee] to its unlicensed agents, contractors, volunteers, or any other person who is not an employee of the [licensee], even for bona fide business purposes, is a transfer or disposition for purposes of the Gun Control Act ..." An assignment is not the same thing as a non-consensual taking.

***8** Also unavailing to the plaintiffs is their argument that a jury could reasonably find that Sportsmen's Outpost engaged in an illegal, "off-the-books" sale to Scott Magnano. See plaintiffs' memorandum in opposition (# 144), p. 11. This theory is not pleaded.

The plaintiffs' references, in paragraphs 16–19 of the complaint, to the July 13, 2007 visit of a "suspicious customer," which Cortigliano mentioned to police when he reported the theft, and whom he later identified as Scott Magnano, does not change the plaintiffs' allegations about the July 15, 2007 unlawful taking into an alleged "off-the-books" sale.

As discussed above, the court "must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Gold v. Rowland, supra,* 296 Conn. at 200–01, 994 A.2d 106. The "off-the-books" sale theory is not alleged, nor is it necessarily implied. "[A] plaintiff may not allege one cause of action and recover on another." (Internal quotation marks omitted.) *Id.,* at 296 Conn. 221.

Thus, the plaintiffs have not alleged facts showing that, pertaining to the incidents alleged, Sportsmen's Outpost was required to comply with 18 U.S.C. § 922(b)(2) and General Statutes §§ 29–31, 29–33, 29–361. The plaintiffs do not allege a sale, delivery, or transfer in violation thereof. Accordingly, here, as a matter of law, these statutes do not serve as predicate exceptions to the PLCAA.

(b)

18 U.S.C. § 923(g)(6): Delay In Reporting Incident

[2] The plaintiffs also assert that Sportsmen's Outpost violated 18 U . S.C. § 923(g)(6). In paragraph 15 of the complaint, they allege that, after Christman informed Cortigliano that the Glock 21 and ammunition had been stolen, "Sportsmen's Outpost failed to notify police about the theft for approximately three days." The plaintiffs allege that this was a knowing failure to comply with 18 U.S.C. § 923(g)(6), which provides, "[e]ach licensee shall report the theft or loss of a firearm from the licensee's inventory or collection, within 48 hours after the theft or loss is discovered, to the Attorney General and to the appropriate local authorities." See complaint, count one, ¶ 26f.

The defendants contend that § 923(g)(6) is merely a reporting statute, which is not applicable to the "sale or marketing" of firearms. See 15 U.S.C. § 7903(5)(A)(iii). Section 923(g)(6) pertains to the licensing of firearms dealers. As a statute which regulates the firearms industry, violation of it may be a predicate exception to the PLCAA. See *City of New York v. Beretta U.S.A. Corp., supra,* 524 F.3d at 404.

The defendants also argue that the plaintiffs cannot rely on an alleged violation of 18 U.S.C. § 923(g)(6) as a predicate exception, since, as a matter of law, the alleged 24–hour delay in reporting the theft was not the proximate cause of the alleged injuries. They assert that the alleged reporting violation cannot satisfy the second requirement of the statutory exception, that "the violation was a proximate cause of the harm for which relief is sought." See 15 U.S.C. § 7903(5)(A)(iii).

***9** In response, the plaintiffs contend that questions concerning proximate cause are best left to the trier of fact. They assert that the alleged reporting violation of 18 U.S.C. § 923(g)(6), by reporting within three days (seventy-two hours), instead of within the required forty-eight hours, proximately caused Jennifer Magnano's death. As discussed above, the alleged theft occurred on or about July 15, 2007. See complaint, ¶ 12. The shooting of Jennifer Magnano occurred on August 23, 2007, thirty-nine days later, and more than five weeks after (1) when the theft should have been reported and (2) when it was reported. See complaint, ¶ 21.

"The question of proximate causation generally belongs to the trier of fact because causation is essentially a factual issue ... It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citations omitted; internal quotation marks omitted.) *Stewart v. Federated Dept. Stores, Inc.,* 234 Conn. 597, 611, 662 A.2d 753 (1995).

"To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries ... The first component of legal cause is causation in fact. Causation in fact is the purest legal application of ... legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct ... The second component of legal cause is proximate cause ... [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries ... Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendants' conduct] ... The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection ... This causal connection must be based upon more than conjecture and surmise." (Internal quotation marks omitted.) *Winn v. Posades,* 281 Conn. 50, 56–57, 913 A.2d 407 (2007).

"Because actual causation, in theory, is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions ... The fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct ... In negligence cases such as the present one, in which a

tortfeasor's conduct is not the direct cause of the harm, the question of legal causation is practically indistinguishable from an analysis of the extent of the tortfeasor's duty to the plaintiff ...

"The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual ... Essential to determining whether a legal duty exists is the fundamental policy of the law that a tortfeasor's responsibility should not extend to the theoretically endless consequences of the wrong ... Even where harm was foreseeable, [the Supreme Court] has found no duty when the nexus between a defendant's negligence and the particular consequences to the plaintiff was too attenuated." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *First Federal Savings & Loan Assn. of Rochester v. Charter Appraisal Co.,* 247 Conn. 597, 604, 724 A.2d 497 (1999).

***10** Here, as stated above, in order to come within the predicate exception, the plaintiffs claim that the alleged delay in reporting the theft for a twenty-four-hour period is a proximate cause of the murder which occurred over five weeks later. The Appellate Court's recent analysis of proximate cause, as a matter of law, in *Malloy v. Town of Colchester,* 85 Conn.App. 627, 858 A.2d 813, cert. denied, 272 Conn. 907, 863 A.2d 698 (2004), is instructive.

There, the plaintiff suffered serious physical injuries when the motor vehicle he was operating collided with a horse, owned by the Anconas, which was roaming on the road. The plaintiff brought claims against the Town's animal control officer (Favry) and first selectman (Contois). Over many years, the McMorrows, the owners of the property adjoining the Anconas' property, had complained to Favry and Contois about animals, including horses, wandering onto their land from the Anconas' property. "The officials told the McMorrows that there was nothing that they could do about the situation. The animal warden claimed that he could not take custody of an animal unless he found it roaming free." *Id.,* at 85 Conn .App. 630. "The plaintiff assert[ed] that if the defendants had not disavowed a duty to act, on the night of the accident, McMorrow would have notified the appropriate authorities, and the accident would have been prevented." *Id.,* at 632.

In affirming the trial court's setting aside of the jury's verdict as to Favry and Contois, the Appellate Court explained that the connection between the defendants' conduct and the plaintiff's injury was too attenuated to amount to proximate cause of the accident. "[I]t is clear that the legal cause of the accident was the horse and its presence in the road. Even if we assume arguendo that on the night of the accident, McMorrow notified the defendants of the roaming animal, it is conjecture to think that the animal would have been located before the unfortunate accident. Even if the animal had been located, it is conjecture to think that the people engaged in the search would have been able to control or contain the horse in such a way as to have prevented the accident. Moreover, one cannot say that the defendants' alleged failure to act in the past was the proximate cause of the injury because, even if the defendants had impounded the horse in the past, it does not necessarily follow that the horse would not have been roaming on the night in question. There are simply too many assumptions that need to be made in order for this court to conclude that the defendants' failure to investigate the incident was the proximate cause of the plaintiff's injury." *Malloy v. Town of Colchester, supra,* 85 Conn.App. at 634–35, 858 A.2d 813.

Likewise, based on the plaintiffs' allegations here, it is conjecture to think that, if Sportsmen's Outpost had notified the police of the theft of the Glock within forty-eight hours, instead of within seventy-two hours as the plaintiffs allege, that the murder of Jennifer Magnano five weeks later would have been prevented. The alleged twenty-four-hour delay in reporting is too attenuated from the shooting to be a substantial factor in bringing about the plaintiffs' injuries. See *Winn v. Posades, supra,* 281 Conn. 56–57.

***11** Cases cited by the plaintiffs are unpersuasive as to this point. Very different circumstances were at issue in *Kalina v. K–Mart Corp.,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 90 269920, 1993 WL 307630 (August 5, 1993, Lager, J.), where the plaintiff's decedent died from gunshot wounds after her estranged husband shot her with a rifle he had purchased on the same day at a K–Mart store. Thus, that shooting happened very soon after the alleged sale, not over five weeks later.

There, the court concluded that "reasonable minds could conclude that the scope of risk created by the negligent sale of a firearm and ammunition encompasses acts

that endanger others ...” *Id.* That is not the issue here with respect to the allegation of delay in reporting. The scope of risk created by Scott Magnano's emergence from Sportsmen's Outpost with the Glock is a different question from that of whether the twenty-four-hour delay in reporting the incident, five weeks before the shooting, was a proximate cause thereof.

Similarly, delay in reporting apparently was not at issue in *Johnson v. Bryco Arms,* 304 F.Sup.2d 383, 399–400 (E.D.N.Y.2004), where a firearm was used in a massacre at a Wendy's Restaurant. Instead, the plaintiff alleged that “the distributor, Acusport, negligently entrusted the firearm in question to the retailer, Atlantic Gun & Tackle, despite the knowledge that it was consistently engaging in sales that diverted guns into the illegal, underground firearms market. He further alleges that Atlantic Gun & Tackle sold the gun in question to Angela Freeman although it knew or should have known that she was a straw purchaser who was buying the gun on behalf of Bernard Gardier who could not legally purchase it himself. Although the firearm subsequently changed hands illegally a number of times before ultimately coming into the possession of plaintiff's attackers, it is alleged that defendants were put on notice that this kind of transfer would foreseeably occur ... Plaintiff also contends that defendants are part of a small group of corrupt or negligent gun companies which play a disproportionate role in supplying the illegal gun market. He alleges that defendants' marketing and distribution practices result in guns moving more readily into the illegal market than do those of other distributors or retailers and that defendants had the power to stop the flow of their guns into the illegal market but did not do so.” *Id.* Thus, rather than alleged conduct which was too attenuated from the alleged consequences, the court found that the plaintiff had alleged a “direct causal connection ... between defendants' business practices and plaintiff's injuries[.]” *Id.,* at 400. A direct causal connection between the alleged twenty-four-hour delay in reporting the incident to the police and the shooting five weeks later is absent here.

Since they are too attenuated and call for conjecture and surmise, as a matter of law, the plaintiffs' allegations concerning the alleged delay in reporting fail to meet the second requirement of the predicate exception to the PLCAA, that “the violation was a proximate cause of the harm for which relief is sought.” See 15 U.S.C. § 7903(5)(A)(iii)(c)

General Statutes § 29–37d: Burglar Alarm

***12** **[3]** In paragraph 11 of the complaint, the plaintiffs allege that Sportsmen's Outpost had neither a video surveillance system nor a burglar alarm system. They claim that Sportsmen's Outpost knowingly violated General Statutes § 29–37d, which provides, in relevant part, that firearms dealers “shall have a burglar alarm system installed on the premises of its establishment ... Such alarm system shall be directly connected to the local police department or monitored by a central station and shall activate upon unauthorized entry or interruption to such system.”

Since this statute regulates the firearms industry, violation of it may be a predicate exception to the PLCAA. See *City of New York v. Beretta U.S.A. Corp., supra,* 524 F.3d at 404.

However, § 29–37d does not require a firearms dealer to have a video surveillance system. In addition, according to the plaintiffs' allegations in their complaint, when Scott Magnano visited Sportsmens' Outpost on July 15, 2007, he was the only customer in the store, dealt with an employee, was left unattended, and removed the Glock and ammunition. See complaint, ¶¶ 12, 14. The plaintiffs do not allege that he broke into and burglarized Sportsmen's Outpost.

Accordingly, no “unauthorized entry or interruption,” which would have caused a required burglar alarm system to activate, is alleged. See General Statutes § 29–37d. Under these circumstances, the lack of a burglar alarm system cannot be “a proximate cause of the harm for which relief is sought.” See 15 U.S.C. § 7903(5)(A)(iii).

2. Negligent Entrustment And Negligence Per Se

[4] The PLCAA also provides exceptions for negligent entrustment and negligence per se claims. Under the PLCAA, a “qualified civil liability action” does not include “an action against a seller for negligent entrustment or negligence per se.” See 15 U.S.C. § 7903(5)(A)(ii).

" '[N]egligent entrustment' means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." See 15 U.S.C. § 7903(5)(B).

This definition is consistent with Connecticut law on negligent entrustment. "[E]ntrustment plainly means *permitting another to do something or to use something.*" (Emphasis in original.) *Bryda v. McLeod,* Superior Court, judicial district of New Haven at Meriden, Docket No. CV 03 0285188 (July 12, 2004, Tanzer, J.) (37 Conn. L. Rptr. 492).

The defendants contend that the plaintiffs' allegations in their complaint establish that this exception is inapplicable, since they do not allege that the Glock and ammunition were supplied by Sportsmen's Outpost to Scott Magnano for his use. The plaintiffs argue that the defendants base their contention on facts which are not in the complaint, "namely, whether or not Defendants' supplied Magnano with the Glock 21 'for his use ..." ' See plaintiffs' memorandum in opposition (# 144), p. 16. They claim that the circumstances surrounding why the defendants delivered the Glock to him have not been uncovered and should not be the subject of defendants' motion. Rather, they assert that they should be permitted to engage in discovery.

***13** The plaintiffs' memorandum, cited above, concedes that they have not alleged that Sportsmens' Outpost supplied the Glock to Scott Magnano for his use. As discussed above, in paragraph 14 of the complaint, they allege that, as a result of being left "unattended and alone," he removed the firearm and ammunition from Sportsmen's Outpost. This is the opposite of being provided a handgun for use since it alleges a taking without permission. The fact that ammunition allegedly was provided does not show that the seller supplied the firearm for Scott Magnano's use. The plaintiffs' allegations, which the court must take to be the facts, fail to come within the negligent entrustment exception to the PLCAA, under which the seller must provide the firearm to the person "for use." See 15 U.S.C. § 7903(5)(B).

As discussed above, the court must take the facts to be those alleged in the complaint and decide the motion on the existing record alone. See *Gold v. Rowland, supra,* 296 Conn. at 200–01, 994 A.2d 106; *Columbia Air Services, Inc. v. Dept. of Transportation, supra,* 293 Conn. at 347–48, 977 A.2d 636.

In this regard, the plaintiffs' reference, at oral argument, to *Cheskus v. Christiano,* 120 Conn. 596, 182 A. 131 (1935), as permitting later amendment to a complaint to come within an applicable statute, is unpersuasive. There, at trial, the complaint was amended to conform to the proof in order to refer to a statute which prohibited operation of a vehicle carrying an extended load unless a red light was attached to the rear end of the load. See *id.,* at 599, 182 A. 131. "The amendment of the complaint with reference to this statute, made at the suggestion of the court, was permissible, full opportunity to meet it having at the same time been extended to the defendants. Its effect was to make the pleadings conform to the proof and it did not in any way change the cause of action for negligence. There was an allegation that the truck was parked without giving any warning, and this statute requires the red light as a warning." *Id.*

There, no challenge to the court's jurisdiction was at issue. Here, in contrast, as stated above, the court is required to adjudicate the motion to dismiss based on the allegations of the complaint. It may not await trial in order to, perhaps, permit a plaintiff to amend the complaint to conform with proof which is later offered. As stated above, once the issue of jurisdiction is raised, the court is required to address it before proceeding further with the case. See *St. Paul Travelers Companies, Inc. v. Kuehl, supra,* 299 at Conn. 816; *Statewide Grievance Committee v. Rozbicki, supra,* 211 Conn. at 245, 558 A.2d 986.

The court has not been apprised of any effort made to conduct discovery prior to the argument of the motion to dismiss. Where, as here, the alleged facts clearly show that the statutory exception is inapplicable, discovery is not warranted to possibly find facts to enable the plaintiff to come within the exception. See *Kenney v. Weaving,* 123 Conn.App. 211, 219 n. 5 (2010) (no request for evidentiary hearing and no effort to engage in discovery prior to argument of motion to dismiss, citing *Standard Tallow v. Jowdy, supra,* 190 Conn. at 56, 459 A.2d 503).

***14** Under these circumstances, the court need not consider the other aspect of the negligent entrustment exception, concerning supplying the weapon "when the

seller knows, or reasonably should know" that use of the product "in a manner involving unreasonable risk of physical injury to the person or others" is likely to ensue. See 15 U.S.C. § 7903(5)(B).

The plaintiffs also argue that Sportsmen's Outpost should have performed a background check on Scott Magnano before presenting weapons to him and leaving him alone. The federal regulatory scheme requires a firearms seller to conduct a background check on a person after he or she decides to purchase a firearm. "A federal firearms dealer has several duties, among which are ... identifying purchasers on ATF Form 4473, which requires a purchaser to note his full name, residence, place of birth, height, and weight and to affirm that he is the actual purchaser of the firearm and that he is not disqualified from purchasing a firearm, and also requires the dealer to list his name and FFL number, and to answer questions regarding the purchaser's type of identification and the type, manufacturer, model, and serial number of the firearm being purchased. A dealer is also required to call the toll-free number of the National Instant Check System (NICS), which is maintained by the FBI, and read the information from Form 4473 over the telephone to obtain a background check on the purchaser." *United States v. Kish,* United States Court of Appeals, Docket Nos. 09–2222, 09–2276 (6th Cir. March 30, 2011), 2011 WL 1195951, n. 2.

A firearms dealer "may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act. [Licensees] are strictly prohibited from initiating a NICS background check for any other purpose." See 28 C.F.R. § 25.6(a).[9] Accordingly, a NICS background check may be initiated only in connection with a "transfer." As discussed above, the plaintiffs' allegations here do not amount to such a transfer. They allege no decision to purchase. Rather, they allege an unlawful taking. See *Estate of Kim v. Coxe,* Alaska Superior Court, Case No. 1JU–08–761 CI, *supra.*[10]

The PLCAA does not provide a definition of negligence per se. "Negligence per se operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles, i.e., that standard of care to which an ordinarily prudent person would conform his conduct." (Internal quotation marks omitted.) *Considine v. Waterbury,* 279 Conn. 830, 860–61 n. 16, 905 A.2d 70 (2006). The Supreme Court has enunciated a "two-prong test for negligence per se: (1) that the plaintiffs were within the class of persons protected by the statute; and (2) that the injury suffered is of the type that the statute was intended to prevent." *Gore v. People's Savings Bank,* 235 Conn. 360, 368–69, 665 A.2d 1341 (1995).

***15** In the plaintiffs' argument as to negligence per se, they state, without specifically identifying either the statutes or the referenced causes of action to which they refer, that they have alleged violations of numerous state and federal firearms laws designed to protect individuals such as Jennifer Magnano from the type of violence which she suffered, by preventing firearms dealers from improperly transferring firearms. The court has addressed above the various statutes cited in their complaint. Since, as discussed above, the court has found no alleged statutory violation applicable to the plaintiffs' allegations, their allegations also do not come within the negligence per se exception to the PLCAA.

3. Purposes Of The PLCAA

The plaintiffs also argue that the PLCAA was not intended to bar cases where gun sellers negligently cause harm, citing remarks by individual United States Senators in the legislative history and 15 U.S.C. § 7901(b)(1), which provides, "[t]he purposes of this chapter are as follows: ... [t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm *solely caused* by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." (Emphasis added.) The plaintiff argues that the defendants seek to delete "solely caused" from 15 U.S.C. § 7901(b)(1), and that the PLCAA does not bar cases where the negligence of a firearms dealer was a contributing cause of harm.

The plaintiffs cite no case which interprets the PLCAA as generally permitting common-law negligence actions to proceed, based on 15 U.S.C. § 7901(b)(1)'s "solely caused by" language. In their memorandum (# 144), page 21, footnote 10, they cite various court decisions, all of which pre-date the PLCAA.

"[I]n all preemption cases, and particularly in those in which Congress has legislated ... in a field in which the States have traditionally occupied, ... we start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Internal quotation marks omitted.) *Wyeth v. Levine,* 555 U.S. 555, 129 S.Ct. 1187, 1194–94, 173 L.E.2d 51 (2009).

The United States Supreme Court adheres to "the cardinal rule that a statute is to be read as a whole, ... since the meaning of statutory language, plain or not, depends on context." (Citation omitted.) *King v. St. Vincent's Hospital,* 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.E.2d 578 (1991). "[T]he starting point for interpreting a statute is the language of the statute itself." (Internal quotation marks omitted.) *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 642, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). "[W]here the language is not dispositive," the court looks to "the intent of Congress as revealed in the history and purposes of the statutory scheme." *Id.*

***16** As recently explained in *Ileto v. Glock, Inc.,* 565 F.3d 1126, 1135 (9th Cir.2009), cert. denied, —— U.S. ——, 130 S.Ct. 3320, 176 L.E.2d 1219 (2010), where the court also addressed the purpose of the PLCAA, including as set forth in 15 U.S.C. § 7901(b)(1), "Congress clearly intended to preempt common-law claims, such as general tort theories of liability." (Footnote omitted.) "That conclusion is bolstered by Congress' inclusion of the second exception to preemption: The PLCAA does not preempt claims against a seller of firearms for negligent entrustment or negligence per se. 15 U.S.C. § 7903(5)(A)(ii). That exception demonstrates that Congress consciously considered how to treat tort claims. While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se)." *Id.,* at 565 F.3d 1135, n. 6.

The District of Columbia Court of Appeals also recently explained that the PLCAA does not bar all actions against gun sellers for negligently causing harm. "Undeniably, Congress meant the PLCAA to apply to pending 'qualified civil liability actions.' ... Congress did not ... 'totally abrogate' causes of action holding manufacturers or sellers liable for their actions causally linked to discharge of their firearms." (Citations omitted; emphasis in original; internal quotation marks omitted.) *District of Columbia v. Beretta U.S.A. Corp.,* 940 A.2d 163, 174–75 (D.C.2008), cert. denied, —— U.S. ——, 129 S.Ct. 1579, 173 L.E.2d 675 (2009) (citing predicate exception, 15 U.S.C. § 7903(5)(A)(iii)). [11]

"Also, Congress left undisturbed actions 'brought against a seller for negligent entrustment or negligence per se,' *id.* § 7903(5)(A)(ii), as well as actions for 'death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product.' *Id.* § 7903(5)(A)(v) ... (Citation omitted.) *Id.,* at 175.

Thus, it is clear that, under the PLCAA, a "qualified civil liability action," see 15 U.S.C. § 7903(5)(A), with certain enumerated exceptions, includes cases where it is alleged that gun sellers negligently cause harm.

In summary, the court concludes that the PLCAA requires dismissal of the claims against Sportsmen's Outpost, since the plaintiffs' allegations are within its purview and do not come within its exceptions.

B

Constitutionality Of The PLCAA

Since, as discussed above, the court concludes that the plaintiffs' action is covered by the PLCAA and does not come within the enumerated statutory exceptions thereto, it next considers the plaintiffs' arguments concerning the constitutionality of the PLCAA. They claim that the PLCAA: (1) violates the Tenth Amendment to the United States Constitution and fundamental principles of federalism; (2) violates the separation of powers; (3) violates their due process rights; (4) violates the guarantee of equal protection; and (5) impermissibly infringes on their First Amendment right to petition.

1. Tenth Amendment And Fundamental Principles Of Federalism

***17** **[5]** The Tenth Amendment to the United States Constitution provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The plaintiffs assert that the PLCAA: (a) impermissibly directs state courts to immediately dismiss pending cases which are valid under state law; and (b)

impermissibly impinges on Connecticut's sovereign right to allocate its lawmaking function.

The Government, as intervenor, asserts that the plaintiffs lack standing to raise a Tenth Amendment claim. While the plaintiffs rely on the minority view of two federal circuits, the court finds persuasive the majority view, as expressed by the Second Circuit's analysis in *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.,* 462 F.3d 219, 234–36 (2d Cir.2006), cert. denied, 552 U.S. 810, 128 S.Ct. 44, 169 L.Ed.2d 11 (2007). There, the court found controlling the United States Supreme Court's statement, in *Tenn. Elec. Power Co. v. Tenn. Valley Auth.,* 306 U.S. 118, 144, 59 S.Ct. 366, 83 L.Ed. 543 (1939), that state-chartered utility companies, "absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment."

Accordingly, here, since the requisite representation by the State of Connecticut or its officers is absent, the plaintiffs lack standing to raise constitutional challenges under the Tenth Amendment. See *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., supra,* 462 F.3d at 234. As a result, the court need not consider this part of their arguments. See *Luurtsema v. Commissioner of Correction, supra,* 299 Conn. at 752. [12]

2. Separation Of Powers

Citing *United States v. Klein,* 80 U.S. 128, 147, 13 Wall. 128, 20 L.Ed. 519 (1871), the plaintiffs argue that the PLCAA violates the separation of powers by directing the outcome of a pending case when no rule of decision has been established, even when such an action is authorized by state law, which the PLCAA leaves undisturbed. "[L]ater decisions have made clear that [*Klein's*] prohibition does not take hold when Congress amend[s] applicable law." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 218, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).

[6] The identical challenge to the PLCAA was raised before the United States Court of Appeals for the Second Circuit in *City of New York v. Beretta U.S.A. Corp., supra,* 524 F.3d at 395–96, where the court explained that "the Act permissibly sets forth a new rule of law that is applicable both to pending actions and to future actions. The PLCAA bars qualified civil liability actions, as defined in the statute. The definition of qualified civil liability action permissibly sets forth a new legal standard to be applied to all actions. See *Miller v. French,* 530 U.S. 327, 348–49, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (holding that the section of Prison Litigation Reform Act providing that a motion to terminate operates as an automatic stay of prospective relief did not violate separation of powers because the automatic stay provision 'simply imposes the consequences of the court's application of the new legal standard' and does not simply direct decision in a pending case); *Robertson [v. Seattle Audubon Soc.],* 503 U.S. [429] at 438–39, 112 S.Ct. 1407[, 118 L.Ed.2d 73 (1992)] (holding that an amendment to governing law allowing timber harvesting in old growth forest under certain conditions and providing that compliance with those conditions would satisfy the statutory requirements at issue in two existing cases 'compelled changes in law, not findings or results under old law'). Because the PLCAA does not merely direct the outcome of cases, but changes the applicable law, it does not violate the doctrine of separation of powers."

***18** "The PLCAA sets forth new standards that must be met before a case may be brought or a pending one may proceed against the manufacturer or seller of a firearm for damages resulting from the use of the firearm by a third person. When, but only when, a suit is found by a court not to meet one of the statutory exceptions to a 'qualified civil liability action,' it must be dismissed ... [N]othing within the statute controls a court's determination as to whether particular cases satisfy [the] new legal standard or its exceptions." (Internal quotation marks omitted.) *District of Columbia v. Beretta U.S.A. Corp., supra,* 940 A.2d at 173. [13]

3. Due Process

[7] The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall ... be deprived of life, liberty, or property, without due process of law." The plaintiffs assert that the PLCAA has wholly eliminated their common-law rights, and those of other firearms violence victims, against particular tortfeasors who have caused them harm, without providing any alternate remedy, thereby depriving them of their due process right of redress in the courts. They claim that, rather than use a narrowly tailored means, Congress has implemented an overly broad and irrational shield.

"Laws enacted by Congress under its power to regulate interstate commerce, and thus meant to 'adjust the burdens and benefits of economic life[,] come to the Court with a presumption of constitutionality, and ... the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.' *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)." *District of Columbia v. Beretta U.S.A. Corp., supra,* 940 A.2d at 174.

"Barring irrational or arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit. Indeed, the Supreme Court has not blanched when settled economic expectations were upset, as long as the legislature was pursuing a rational policy." (Internal quotation marks omitted.) *Ileto v. Glock, Inc., supra,* 565 F.3d at 1140. In the absence of an identified suspect classification, the rational basis test does not involve "a more searching review." *Id.,* at 1141. Also, "although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." (Internal quotation marks omitted.) *Id.*

In enacting the PLCAA, "Congress was especially concerned with '[l]awsuits [that] *have been commenced* ' seeking 'money damages and other relief against manufacturers and sellers of firearms for harms caused by the misuse of their products by others, including criminals,' 15 U.S.C. § 7901(a)(3) (emphasis added), and with the threat to interstate commerce of thus 'imposing liability on an entire industry for harm ... solely caused by others.' *Id.* § 7901(a)(6) ... Thus the PLCAA, extending as it does to all pending and future actions but exempting specified kinds of lawsuits from its reach, is reasonably viewed as an adjust[ment of] the burdens and benefits of economic life by Congress ... one it deemed necessary in exercising its power to regulate interstate commerce." (Citations omitted; emphasis in original; internal quotation marks omitted.) *District of Columbia v. Beretta U.S.A. Corp., supra,* 940 A.2d at 174–75.

***19** As recently discussed by the Connecticut Supreme Court in *Rodriguez v. Testa, supra,* 296 Conn. at 25–26, 993 A.2d 955, in *City of New York v. Beretta U.S.A. Corp., supra,* 524 F.3d at 395, the United States Court of Appeals for the Second Circuit "specifically explained that, '[w]hen enacting the [PLCAA], Congress explicitly found that the third-party suits that the [federal law] bars are a direct threat to the firearms industry, whose interstate character is not questioned. Furthermore, the [federal law] only reaches suits that have an explicit connection with or effect on interstate commerce.' [([I]]nternal quotation marks omitted.) *Id.* The court thus concluded that there was no showing that Congress had exceeded its authority when 'there [could] be no question of the interstate character of the industry in question and [when] Congress rationally perceived a substantial effect on the industry of the litigation that the [federal law sought] to curtail.' " (Emphasis omitted.)

Martinez v. Calfornia, 444 U.S. 277, 281–82, 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (1980), provides a useful illustration. There, a California statute provided that public entities and employees were immune from suit for injury resulting from releasing a prisoner. See *id.,* at 444 U.S. 280. Rejecting a due process challenge, the court stated, "[t]his statute merely provides a defense to potential state tort-law liability." *Id.,* at 281. It found that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Id.,* at 282. Here, in contrast, concerning the PLCAA, Congress explained the federal interest in protecting the firearms industry from third-party suits, which were found to be a direct threat thereto.

With respect to the plaintiffs' contention that Congress should have acted more narrowly, "under the deferential standard of review applied in substantive due process challenges to economic legislation, there is no need for mathematical precision in the fit between justification and means." *Concrete Pipe & Products of Calif., Inc. v. Construction Laborers Pension Trust,* 508 U.S. 602, 639, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). In view of Congress' explanation of the purposes of the PLCAA, discussed in part above, the means it chose, placing limits on permissible litigation, with specified exceptions, has not been shown to be irrational and arbitrary.

Plaintiffs' reliance on *N.Y. Cent. R.R. Co. v. White,* 243 U.S. 188, 201, 37 S.Ct. 247, 61 L.Ed. 667 (1917); and *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 88, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), is

unpersuasive. As explained in *Ileto v. Glock, Inc., supra,* 565 F.3d at 1144, "[i]n *White,* the Court expressed concern about whether 'a State might, without violence to the constitutional guaranty of due process of law, suddenly set aside *all common-law rules* respecting liability as between employer and employee, without providing a reasonably just substitute.' 243 U.S. at 201, 37 S.Ct. 247, 61 L.Ed. 667 (emphasis added). That dictum is inapposite. The PLCAA contains numerous exceptions and comes nowhere near setting aside all common-law rules concerning firearm manufacturers ... *Duke Power* is even less persuasive. There, the Court reiterated that it was an open question whether a legislature may abolish a common-law recovery scheme without providing a reasonable substitute remedy. *Duke Power,* 438 U.S. at 88, 98 S.Ct. 2620, 57 L.Ed.2d 595 ... [H]ere Congress has left in place a number of substitute remedies." (Internal quotation marks omitted.)

***20** Also, in *Duke Power,* 438 U.S. 88 n. 32, the court stated that it is "clearly established that [a] person has no property, no vested interest, in any rule of the common law ... The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, ... despite the fact that otherwise settled expectations may be upset thereby ... Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." (Citations omitted; internal quotation marks omitted.)

Likewise unavailing to the plaintiffs are *Truax v. Corrigan,* 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921) and *Poindexter v. Greenhow,* 114 U.S. 270, 5 S.Ct. 903, 29 L.Ed. 185 (1885). In *Truax,* the court found that an Arizona statute, concerning the remedy of injunction in labor disputes, "grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful." *Truax v. Corrigan, supra,* 257 U .S. at 328. As explained above, no such complete immunity is provided by the PLCAA, which requires dismissal of certain claims but not others.

Similarly, concerning a contract right to pay taxes by tendering bond coupons, the *Poindexter* court stated that a State may not deny "all redress for a deprivation of a right secured to him by the Constitution. To take away all remedy for the enforcement of a right is to take away the right itself." *Poindexter v. Greenhow, supra,* 114 U.S. at 303. The PLCAA does not deny tort victims all redress; rather, it selectively preempts certain actions. [14]

As explained above, the PLCAA does not deprive the plaintiffs of all remedies. "[T]he PLCAA does not completely abolish [p]laintiffs' ability to seek redress. The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule. Some claims are preempted, but many are not." *Ileto v. Glock, Inc., supra,* 565 F.3d at 1143.

Here, the PLCAA would not have prevented the plaintiffs from commencing an action against Scott Magnano's estate. In addition, the PLCAA permits actions which come within its several exceptions. See 15 U.S.C. § 7903(5)(A). In order to effectuate its purposes, the PLCAA rationally limits the categories of actions which are permitted against firearms dealers.

4. Equal Protection

[8] Although the Fifth Amendment does not specifically refer to equal protection, the United States Supreme Court repeatedly has found there to be an "equal protection component of the Due Process Clause of the Fifth Amendment." *United States v. Armstrong,* 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (citing *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954)).

The plaintiffs contend that the PLCAA violates the equal protection guarantee of the Fifth Amendment by (1) depriving certain victims of firearm industry wrongdoing of their right to a remedy, while other persons may still recover, so long as the tortfeasor sold a product other than firearms; and (2) by discriminating even among victims of firearm seller negligence, in allowing victims harmed in states with statutory established causes of action to recover in court, while barring relief to others harmed in states where the judiciary established common-law standards. The second argument is premised on the predicate exception, discussed above, in which the PLCAA provides that a qualified civil liability action "shall not include ... an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the

harm for which relief is sought." See 15 U.S.C. § 7903(5)(A)(iii).

***21** "Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Concerning the PLCAA, in *Ileto v. Glock, Inc., supra,* 565 F.3d at 1141, the court rejected the argument that review of the plaintiffs' equal protection contentions was subject to a higher level of scrutiny.

"There is nothing irrational or arbitrary about Congress' choice here: It saw fit to 'adjust the incidents of our economic lives' by preempting certain categories of cases brought against federally licensed manufacturers and sellers of firearms. In particular, Congress found that the targeted lawsuits 'constitute an unreasonable burden on interstate and foreign commerce of the United States,' 15 U.S.C. § 7901(a)(6), and sought '[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce,' *id.* § 7901(b)(4) ... Congress carefully constrained the [PLCAA's] reach to the confines of the Commerce Clause. See, e.g., [15 U.S.C.] § 7903(2) (including an interstate-or foreign-commerce element in the definition of a 'manufacturer'); *id.* § 7903(4) (same: 'qualified product'); *id* . § 7903(6) (same: 'seller')." (Footnote omitted.) *Ileto v. Glock, Inc., supra,* 565 F.3d at 1140. "We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected." *Id.,* at 1140–41. See 15 U.S.C. §§ 7901(a)(3)(6); 7901(b)(4) (Congressional findings concerning impact of lawsuits on firearms industry; purpose of preventing such lawsuits from imposing unreasonable burdens on commerce).

In *Duke Power,* the United States Supreme Court similarly concluded that there was no equal protection violation based on Congress' different treatment of the nuclear energy industry. "The general rationality of the Price–Anderson Act liability limitations—particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy-is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes. Speculation regarding other arrangements that might be used to spread the risk of liability in ways different from the Price–Anderson Act is, of course, not pertinent to the equal protection analysis." *Duke Power Co. v. Carolina Envtl. Study Group, Inc., supra,* 438 U.S. at 93–94.

***22** Accordingly, since, in the PLCAA, Congress had a rational basis, protecting the firearms industry from defined "qualified civil liability actions," its decision to treat persons injured by firearms differently does not violate the plaintiffs' right to equal protection.

5. Right To Petition

[9] The plaintiffs also argue that the PLCAA infringes on their and other gun violence victims' First Amendment right to petition, which includes the right to seek redress through the courts. The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."

"[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances ." *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). The right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights." (Internal quotation marks omitted.) *BE & K Constr. Co. v. NLRB,* 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002).

As explained by the United States Court of Appeals for the Second Circuit in *City of New York v. Beretta U.S.A. Corp., supra,* 524 F.3d 3 at 97–98, the PLCAA does not violate this right. "By its terms, the [PLCAA] bars plaintiffs from courts for the adjudication of qualified civil liability actions, allowing access for only those actions that fall within [its] exceptions ... [T]hese restrictions do not violate plaintiffs' right of access to the courts. The constitutional right of access [to the courts] is violated where government officials obstruct legitimate efforts to seek judicial redress ... Unconstitutional deprivation of a

cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively ... The right to petition exists in the presence of an underlying cause of action and is not violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action ... [O]ur cases rest on the recognition that the right [of access to the courts] is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court ... The PLCAA immunizes a specific type of defendant from a specific type of suit. It does not impede, let alone entirely foreclose, general use of the courts by would-be plaintiffs ... For these reasons, the PLCAA cannot be said to deprive the [plaintiffs] of [their] First Amendment right of access to the courts." (Citations omitted; internal punctuation and quotation marks omitted.)

In summary, having considered each of the plaintiffs' constitutional challenges to the PLCAA, the court concludes that the plaintiffs have not shown that the PLCAA violates their constitutional rights.

C

Claims Against Cortigliano

***23** The defendants contend that the PLCAA requires that all of the plaintiffs' claims, including those against Cortigliano, must be dismissed, since this case is a "qualified civil liability action" brought against "sellers" of a qualified product. See 15 U.S.C. § 7903(5)(a). The plaintiffs do not dispute that they allege that Cortigliano is a seller, as defined in the PLCAA.

As discussed above, under the PLCAA a "qualified civil liability action" includes those brought against a "manufacturer or seller of a qualified product." See 15 U.S.C. § 7903(5)(A). A "qualified product" includes a firearm or ammunition. See 15 U.S.C. § 7903(4).

"The term 'seller' means, with respect to a qualified product ... a dealer (as defined in section 921(a)(11) of title 18) [15] who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18; or ... a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18) [16] in interstate or foreign commerce at the wholesale or retail level." See 15 U.S.C. § 7903(6). Under the PLCAA, "[t]he term 'engaged in the business' has the meaning given that term in section 921(a)(21) of title 18, [17] and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition." See 15 U.S .C. § 7903(1).

In their complaint, the plaintiffs allege that Cortigliano is and was the principal and/or president of Sportsmen's Outpost, a federally licensed firearms dealer, which is or was engaged in the business of selling firearms to the general public and was authorized to do so in Connecticut. See complaint, ¶ ¶ 4, 7, 8. They allege that, as a licensed firearms dealer, Sportsmen's Outpost, and its agents and employees, and Cortigliano "knew or reasonably should have known their obligations under the federal and state statutes regulating the firearms industry." See complaint, ¶ 10. In Count Two, paragraph 30, they allege that Cortigliano owed them a duty "to adhere to federal and state statutes and regulations concerning the possession, delivery and/or sale of firearms and to exercise reasonable care in, among other ways, the safekeeping of firearms and ammunition in its possession and in reporting any theft or loss of weapons to police." They also allege that he exercised complete control over Sportsmen's Outpost. See Complaint, Count Two, ¶ 31. These allegations are incorporated in all counts alleged against Cortigliano.

Thus, the plaintiffs allege that Cortigliano was engaged in the business of selling firearms and ammunition, and controlled the operations of Sportsmen's Outpost, a federally licensed firearms dealer. With respect to the Glock and ammunition at issue here, Cortigliano was a "seller" as defined by the PLCAA. Accordingly, as discussed above with respect to Sportsmen's Outpost, all claims against him fall under the purview of the PLCAA.

***24** Since, as discussed above, the PLCAA requires dismissal of the claims against Sportsmen's Outpost, for the same reasons, dismissal of the plaintiffs' claims against Cortigliano is also required.

CONCLUSION

Based on the foregoing reasons, the defendants' motion to dismiss the complaint is granted. In view of that determination, there is no need for the court to consider the motion to strike individual counts. Judgment may enter for the defendants. It is so ordered.

All Citations

Not Reported in A.3d, 2011 WL 2479693

Footnotes

1 "In general, we look to the federal courts for guidance in resolving issues of federal law ... Decisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive." (Citations omitted.) *Turner v. Frowein,* 253 Conn. 312, 340–41, 752 A.2d 955 (2000).

2 At oral argument, the plaintiffs mentioned the PLCAA's "minor child exception." 15 U.S.C. § 7903(5)(D) provides, "[n]othing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A)." This provision does not create an additional exception to the PLCAA; rather, it states that the PLCAA shall not be construed to limit a child's right to recover in a civil action which meets the requirements of enumerated exceptions.

3 In their memorandum in opposition (# 144), p. 8, the plaintiffs mention other statutes, besides those discussed below, which are not pleaded in their complaint, such as 18 U.S.C. §§ 2 and 922(d), (m), and (t). Since these statutes are not pleaded, the court need not consider them. See Practice Book § 10–3. Also, since they are merely mentioned in the plaintiffs' memorandum, the court need not consider them for that reason also. See *Connecticut Coalition Against Millstone v. Connecticut Siting Council,* 286 Conn. 57, 87, 942 A.2d 345 (2008) ("We are not obligated to consider issues that are not adequately briefed ... Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived ..." (Citation omitted; internal quotation marks omitted.).

4 Section 29–31 provides, in relevant part, that "[n]o *sale* of any pistol or revolver shall be made except in the room, store or place described in the permit for the sale of pistols and revolvers, and such permit or a copy thereof certified by the authority issuing the same shall be exposed to view within the room, store or place where pistols or revolvers are sold or offered or exposed for sale, and *no sale or delivery* of any pistol or revolver shall be made unless the purchaser or person to whom the same is to be delivered is personally known to the vendor of such pistol or revolver or the person making delivery thereof or unless the person making such purchase or to whom delivery thereof is to be made provides evidence of his identity." (Emphasis added.)

5 Section 29–33 provides, in relevant part, "(a) [n]o person, firm or corporation shall *sell, deliver or otherwise transfer* any pistol or revolver to any person who is prohibited from possessing a pistol or revolver as provided in section 53a–217c" and "(b) ... no person may *purchase or receive* any pistol or revolver unless such person holds a valid permit to carry a pistol or revolver ... a valid permit to sell at retail a pistol or revolver ..., or a valid eligibility certificate for a pistol or revolver ... or is a federal marshal, parole officer or peace officer." (Emphasis added.)

Section § 29–33(c) provides that "[n]o person, firm or corporation shall *sell, deliver or otherwise transfer* any pistol or revolver except upon written application on a form prescribed and furnished by the Commissioner of Public Safety" and that "[n]o *sale, delivery or other transfer* of any pistol or revolver shall be made unless the person making the purchase or to whom the same is delivered or transferred is personally known to the person selling such pistol or revolver or making delivery or transfer thereof or provides evidence of his identity in the form of a motor vehicle operator's license, identity card ... or valid passport. No *sale, delivery or other transfer* of any pistol or revolver shall be made until the person, firm or corporation making such transfer obtains an authorization number from the Commissioner of Public Safety. Said commissioner shall perform the national instant criminal background check and make a reasonable effort to determine whether there is any reason that would prohibit such applicant from possessing a pistol or revolver as provided in section 53a–217c. If the commissioner determines the existence of such a reason, the commissioner shall deny the sale and no pistol or revolver shall be *sold, delivered or otherwise transferred* by such person, firm or corporation to such applicant." (Emphasis added.)

Section 29–33(e) provides that, "[u]pon the *sale, delivery or other transfer* of any pistol or revolver, the person making the purchase or to whom the same is delivered or transferred shall sign a receipt for such pistol or revolver which shall contain the name and address of such person, the date of sale, the caliber, make, model and manufacturer's number and a general description of such pistol or revolver, the identification number of such person's permit to carry pistols

or revolvers, ... permit to sell at retail pistols or revolvers, ... or eligibility certificate for a pistol or revolver, ... and the authorization number designated for the transfer by the Department of Public Safety. The person, firm or corporation selling such pistol or revolver or making delivery or transfer thereof shall give one copy of the receipt to the person making the purchase of such pistol or revolver or to whom the same is delivered or transferred, shall retain one copy of the receipt for at least five years, and shall send, by first class mail, or electronically transmit, within forty-eight hours of such *sale, delivery or other transfer,* one copy of the receipt to the Commissioner of Public Safety and one copy of the receipt to the chief of police or, where there is no chief of police, the warden of the borough or the first selectman of the town, as the case may be, of the town in which the transferee resides." (Emphasis added.)

6 Section 29–361(a) provides that the "Commissioner of Public Safety shall establish a state database ... that any person, firm or corporation who sells or otherwise transfers pistols or revolvers may access, by telephone or other electronic means in addition to the telephone, for information to be supplied immediately, on whether a permit to carry a pistol or revolver, ... a permit to sell at retail a pistol or revolver, ... or an eligibility certificate for a pistol or revolver, ... is valid and has not been revoked or suspended."

Section 29–361(d)(1) provides that "[t]he Department of Public Safety shall be the point of contact for initiating a background check through the National Instant Criminal Background Check System (NICS), established under section 103 of the Brady Handgun Violence Prevention Act, on individuals purchasing firearms."

Section 29–361(e) provides, "[a]ny person, firm or corporation that contacts the Department of Public Safety to access the database established under this section and determine if a person is *eligible to receive or possess a firearm shall not be held civilly liable for the sale or transfer* of a firearm to a person whose receipt or possession of such firearm is unlawful or for *refusing to sell or transfer a firearm to a person who may lawfully receive or possess such firearm* if such person, firm or corporation relied, in good faith, on the information provided to such person, firm or corporation by said department, unless the conduct of such person, firm or corporation was unreasonable or reckless. (Emphasis added.)

Section 29–361(f) provides that "[a]ny person, firm or corporation that *sells, delivers or otherwise transfers* any firearm ... shall contact the Department of Public Safety to access the database established under this section and receive an authorization number for such sale, delivery or transfer." (Emphasis added.)

7 The plaintiffs also claim that General Statutes § 53a–217c, which concerns criminal possession of a pistol or revolver, prohibits firearms dealers from selling, delivering, or otherwise transferring a firearm to a person subject to a restraining order. This statute does not refer to firearms dealers or to the sale, delivery or transfer of a firearm. Rather, as quoted above, see note 5, it is referred to in § 29–33.

8 ATF is the federal Bureau of Alcohol, Tobacco, Firearms and Explosives.

9 As discussed above, General Statutes § 29–33(c) similarly provides for a background check under like circumstances.

10 Under these circumstances, the example used in the predicate exception, 15 U.S.C. § 7903(5)(A)(iii)(I), of failing to make an appropriate entry in a required record, is not applicable. That subsection provides that the predicate exception includes "any case in which the manufacturer or seller knowingly ... failed to make appropriate entry in ... any record required to be kept under Federal or State law with respect to the qualified product ..."

11 As explained above, under the predicate exception, a qualified civil liability action "shall not include ... an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute *applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm* for which relief is sought." See 15 U.S.C. § 7903(5)(A)(iii). (Emphasis added.)

12 The court notes that the United States Court of Appeals for the Second Circuit discussed this issue in *City of New York v. Beretta U.S.A. Corp., supra,* 524 F.3d at 396–97, apparently since it was raised by the City, as a state entity, cited *New York v. United States,* 505 U.S. 144, 161–66, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (relied on here by the plaintiffs), and stated, "The PLCAA does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them ... The PLCAA therefore does not violate the Tenth Amendment." (Citation omitted; internal quotation marks omitted) *Id.,* at 397.

13 Since, as discussed above, this court is directed not to decide constitutional issues when it is not necessary, it need not consider the Government's argument that separation of powers does not extend to non-Article III courts.

14 Thus, the court respectfully disagrees with the discussion of Due Process, cited by the plaintiffs, in *City of Gary v. Smith & Wesson Corp.,* Lake Superior Court, Cause No. 45D05–CT–00243 (October 23, 2006, Pete, J.), affirmed on other grounds, 875 N.E.2d 422 (Ind.App.2007), transfer denied, 915 N.E.2d 978 (Ind.2009).

15 18 U.S.C. § 921(a)(11) defines "dealer" to mean "(A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or

trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term 'licensed dealer' means any dealer who is licensed under the provisions of this chapter."

16 18 U.S.C. § 921(a)(17) defines "ammunition" to mean "ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm."

17 18 U.S.C. § 921(a)(21)(C) defines "engaged in the business" to include "as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms."

2011 WL 4509540
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford,
Complex Litigation Docket.

Richard GILLAND, Jr., Administrator et al.
v.
SPORTSMEN'S OUTPOST, INC. et al.

No. X04CV095032765S.
|
Sept. 15, 2011.

Opinion

ROBERT B. SHAPIRO, Judge.

***1** In its May 26, 2011 memorandum of decision (# 161) (decision), the court concluded that this matter is barred by the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 et seq. (PLCAA), which prohibits the commencement of a "qualified civil liability action." See 15 U.S.C. § 7902(a). The court granted the defendants' motion to dismiss the plaintiffs' second amended complaint, and ordered that judgment enter for the defendants. This matter is before the court concerning the plaintiffs' motion to reargue defendants' motion to dismiss (# 163) (motion to reargue) and their renewed motion for to leave to amend (# 162) (June 2011 motion to amend), which, post-dismissal, seeks to amend their second amended complaint. Requests for adjudication concerning these motions were filed on September 1, 2011.

I

Background

The background of this matter was summarized in the decision and need not be repeated. Additional background is provided in view of the issues raised by the motion to reargue and the June 2011 motion to amend.

In this matter, the plaintiffs amended their complaint twice in response to motions to dismiss based on the PLCAA. The original complaint was served in August 2009 (see return of service). In response to a motion to dismiss and/or strike, the plaintiffs filed a request for leave to amend their complaint and an amended complaint in December 2009 (# 105). The defendants did not object; as a result the amended complaint became operative. In response to a second motion to dismiss and/or strike, the plaintiffs sought leave to file their second amended complaint (# 114) in March 2010. Again, the defendants did not object and the second amended complaint became the operative complaint.

In June 2010, after a third motion to dismiss and/or strike filed by the defendants, again premised on the PLCAA (# 118), the plaintiffs sought permission to amend again, to file a third amended complaint. See # 126. Since the defendants opposed this third proposed amended complaint (see # 127), and since the defendants' motion to dismiss and/or strike was pending and the defendants challenged subject matter jurisdiction by asserting that the PLCAA required the immediate dismissal of the case, the court declined to rule on the request for leave to amend. See Order dated July 20, 2010 (# 131) (July 2010 order). The court ordered a briefing schedule and scheduled the defendants' motion for hearing. Subsequently, the United States of America was permitted to intervene to address the constitutionality of the PLCAA. See # 147.86. After briefing and oral argument, the decision was issued on May 26, 2011.

The plaintiffs filed their June 2011 motion to amend on June 15, 2011 at 5:00 p.m. The court's E–Filing system also recorded that on June 15, 2011, at 5:04 p.m., the motion to reargue was received for filing. See Exhibit 2 to plaintiffs' reply (# 171). As reflected on the Court's Docket, the motion to reargue was deemed to be filed on the next day, June 16, 2011, twenty-one days after the issuance of the decision.

***2** The docketing of the filing of the motion to reargue as having occurred on June 16, 2011, not on June 15, 2011, was required by Practice Book § 7–17, which provides, in relevant part, "a document that is electronically received by the clerk's office for filing after 5 o'clock in the afternoon on a day on which the clerk's office is open or that is electronically received by the clerk's office for filing at any time on a day on which the clerk's office is closed, *shall be deemed filed on the next business day* upon which such office is open." (Emphasis added.) The plaintiffs did

not move for an extension of time in which to file the motion to reargue.

II

Discussion

A

Timeliness

The plaintiffs seek reargument, and leave to amend, based on *City of N.Y. v. Mickalis Pawn Shop, LLC,* 645 F.3d 114 (2d Cir. May 4, 2011) (*Mickalis*), a decision issued after oral argument of the motion to dismiss was held by this court on March 7, 2011. [1] Although that decision of the United States Court of Appeals was issued three weeks before this court issued its decision on May 26, 2011, the plaintiffs did not bring it to the court's attention until after they received the court's decision granting the motion to dismiss, when they filed the June 2011 motion to amend on June 15, 2011 and their motion to reargue on June 16, 2011. [2] The plaintiffs assert that reargument and amendment are warranted, since *Mickalis* determined that the PLCAA is not subject matter jurisdictional. See *id.,* at 645 F.3d 127. As discussed below, that ruling applied to federal courts.

The defendants contend that the time permitted by the Rules of Practice in which to seek reargument elapsed before the motion to reargue was filed, making it untimely. Assuming, *arguendo,* that the plaintiffs had timely filed their motion to reargue, thereby tolling the deadline to appeal, the defendants also assert that the motion to amend should be denied because it would cause unreasonable delay, take unfair advantage of and prejudice the defendants, and confuse the factual issues. In addition, they assert that the plaintiffs are judicially estopped from changing their factual allegations to attempt to negate the dismissal of the case.

"A party only has twenty days from the date of judgment in which to file a motion for reconsideration. Practice Book § 11–12(a). After the twenty days has passed, no such motions can be filed and the judgment becomes final." *Weinstein v. Weinstein,* 275 Conn. 671, 699–700 n. 21, 882 A.2d 53 (2005). "[T]he time to appeal runs from the announcement of the trial court of its decision, either orally or by filing a memorandum of decision, and the time within which to file the appeal is not postponed to the formal entry of judgment ..." *Grzys v. Connecticut Co.,* 123 Conn. 605, 607 n., 198 A. 259 (1938). See *Jaquith v. Revson,* 159 Conn. 427, 431, 270 A.2d 559 (1970) ("[A]ctual judgment was the pronouncement by the court of its decision upon the issues before it, which took the form of a memorandum of decision").

***3** "Practice Book Sections 11–11 and 11–12 require a motion to reargue to be filed within twenty days of the filing and mailing of the decision sought to be reargued." *Rossman v. Morasco,* Superior Court, judicial district of Stamford–Norwalk, Complex Litigation Docket at Stamford, Docket No. X08 CV 01 0183603 (December 21, 2006, Adams, J.). As explained in *Anderson v. City of New London,* Superior Court, judicial district of New London at New London, Docket No. CV 541273 (February 24, 2000, Corradino, J.), "Practice Book § 11–11 applies to '[a]ny motions which would, pursuant to Section 63–1, delay the commencement of the appeal period ... and any motions which, pursuant to Section 63–1, would toll the appeal period ...' A motion will delay the commencement of the appeal period if it is a motion ... that, if granted, would render the judgment, decision or acceptance of the verdict ineffective. Practice Book § 63–1(c)(1). 'Motions that, if granted, would render a judgment, decision or acceptance of the verdict ineffective include ... motions that seek ... reargument of the judgment or decision.' *Id.* The motion, however, will only delay the commencement of the appeal period if it 'is filed within the appeal period ...' *Id.*

Practice Book § 63–1 provides that '[u]nless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given.' Practice Book § 63–1(a) ... The motion is untimely because it was not filed within twenty days cf. *K.A. Thompson Electric Co. v. Wesco, Inc.,* 24 Conn.App. 758 (1991) where the court said: 'Because the plaintiff's motion to reargue was *timely* filed within the original appeal period and the appeal was filed within twenty days of the denial of that motion, we conclude that the plaintiff's appeal was timely filed.' *Id.,* at pp. 760–61. The issue raised in the case was 'whether the timely filing of a motion to reargue tolls the runnings of the appeal period.' *Id.,* at p. 758. The court decided that it did and refused to

dismiss the appeal. A corollary of the court's reasoning is that if the motion to reargue had not been filed within the appeal period, the trial court would not have entertained the motion to reargue. For example, a trial court has no power to extend the time for an appeal unless a motion requesting such relief is filed within the appeal period. *In re Karen R.,* 45 Conn.Sup. 255, 257 (1998), *Farmers & Mechanics Savings Bank v. Sullivan,* 216 Conn. 341, 366 (1990). If that is the case, how can the court entertain a motion to reargue going to the merits filed beyond the appeal period? It cannot." (Emphasis in original.)

The plaintiffs contend that their motion to reargue was timely because their June 2011 motion to amend, which was filed previously at 5:00 p.m. on June 15, 2011, tolled the appeal period when it was filed.

Practice Book § 63–1(c)(1) states, in relevant part, "[i]f a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, ... a new twenty day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion ..." Practice Book § 63–1(c)(1) also provides, in relevant part, "Motions that, if granted, would render a judgment ... ineffective include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; the setting aside of the verdict; judgment notwithstanding the verdict; reargument of the judgment or decision; collateral source reduction; additur; remittitur; or any alteration of the terms of the judgment.

***4** 'Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision; a written or transcribed statement of the trial court's decision; or reargument of a motion listed in the previous paragraph."

Thus, "[m]otions that, if granted, would render a judgment, decision, or acceptance of the verdict ineffective include motions that seek any alteration of the terms of a judgment or decision." *In re Haley B.,* 262 Conn. 406, 412, 815 A.2d 113 (2003). Practice Book § 63–1(c)(1) lists the types of motions which would render a judgment or decision ineffective and states that such motions are "not limited to" those listed. A motion to amend a complaint is not among those listed. Since it is addressed to a plaintiff's allegations, and not to a judgment or decision, a motion to amend a complaint differs from the type of motions contemplated in Practice Book § 63–1(c)(1).

The plaintiffs' June 2011 motion to amend is not a Practice Book §§ 63–1(c)(1) motion. It presents again their proposed third amended complaint, which is dated June 18, 2010, almost one year prior to the issuance of the decision on May 26, 2011.

The June 2011 motion to amend does not seek to modify the court's judgment. In *Jaser v. Jaser,* 37 Conn.App. 194, 655 A.2d 790 (1995), the court explained the distinction between a motion which seeks the modification of a judgment and one which seeks reargument. "Regardless of how the [plaintiffs] characterize ... [their] motion, we must examine the practical effect of the trial court's ruling in order to determine its nature." *Id.,* at 202. "A modification is defined as [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact ... Conversely, the purpose of a reargument is ... to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts ... A reconsideration implies reexamination and possibly a different decision by the [court] which initially decided it ... While a modification hearing entails the presentation of evidence of a substantial change in circumstances, a reconsideration hearing involves consideration of the trial evidence in light of outside factors such as new law, a miscalculation or a misapplication of the law. To set aside means [t]o reverse, vacate, cancel, annul, or revoke a judgment ... (Citations omitted; footnote omitted; internal quotation marks omitted.) *Id.,* at 202–03.

The filing of a motion to amend does not, as the plaintiffs contend, render the dismissal moot. Such a motion is not the equivalent of a motion seeking either a modification to or a vacating of a judgment of dismissal. *In re Haley B., supra,* 262 Conn. at 406, cited by the plaintiffs, illustrates this distinction. There, an oral request was treated by the trial court as a motion for clarification and the trial court changed its decision as to frequency of visitation. See *id.,* at 409–10. Notwithstanding the trial court's characterization of the motion, the Supreme Court looked "to the substance of the relief sought by the motion rather than the form," *id.,* at 413, and found that

"a portion of the court's original decision, namely, that part requiring weekly visitation, was rendered *ineffective* by the subsequent order of the court reducing visitation to a monthly basis. It is apparent to us, therefore, that the parties presented, and the trial court ruled on, in substance, a motion to alter or modify the trial court's previous judgment." (Emphasis in original.) *Id.,* at 414. Since the terms of the judgment were modified, the trial court's order gave rise to a new twenty-day appeal period. See *id.*

***5** Here, in contrast, the motion to amend seeks to change the plaintiffs' allegations. Rather than substantively address the decision and the reasons why the court found their claims were barred by the PLCAA, the plaintiffs claim that their allegations in the proposed third amended complaint bring the case outside the PLCAA. See plaintiffs' memorandum (# 165), p. 5. The court addresses the proposed changes below at pages 14–15.

In addition, the texts of the plaintiffs' own motions show that their June 2011 motion to amend could not toll the appeal period because it did not comply with Practice Book § 11–11. Practice Book § 11–11 provides, in relevant part, "Any motions which would, pursuant to Section 63–1, delay the commencement of the appeal period, and any motions which, pursuant to Section 63–1, would toll the appeal period and cause it to begin again, shall be filed simultaneously insofar as such filing is possible and ... *shall* indicate on the bottom of the first page of the motion that such motion is a Section 11–11 motion. The foregoing applies to motions to reargue decisions that are final judgments for purposes of appeal ..." (Emphasis added.) The motion to amend does not state that it is a "Section 11–11 motion." In contrast, at the bottom of its first page, the motion to reargue does state that it is such a motion. [3]

For the reasons stated above, the motion to amend is not a motion which tolls the appeal period. The motion to reargue, which, as stated above, was filed on June 16, 2011, was untimely. "Under our rules the court concludes it does not have the power or right to decide this matter in any other way." *Anderson v. City of New London, supra,* Superior Court, Docket No. CV 541273.

B

Amendment

The plaintiffs argue that the court's July 2010 order concerning their previous motion to amend runs counter to *City of N.Y. v. Mickalis Pawn Shop, LLC, supra,* at 645 F.3d 114 (*Mickalis*), which was issued three weeks prior to this court's May 26, 2011 decision, but not brought to the court's attention by the plaintiffs until after they received this court's decision dismissing this case. The plaintiffs contend that, in light of *Mickalis,* which concluded that, in federal court, the PLCAA is not subject matter jurisdictional, this court should now grant their June 2011 motion to amend.

In essence, this aspect of the plaintiffs' argument seeks to reargue the court's July 2010 order, long after the twenty-day period afforded by Practice Book § 11–12 for the filing of a motion to reargue. See Practice Book § 11–12(d) (§ 11–12 applies to decisions which are not final judgments). The plaintiffs did not file a timely motion to reargue concerning the court's July 2010 order. "After the twenty days has passed, no such motions can be filed ... *Weinstein v. Weinstein, supra,* 275 Conn. at 699–700, n. 21.

Also, the court is unpersuaded that *Mickalis* counsels a different result in this Connecticut court. There, the United States Court of Appeals conclude[d] that the PLCAA's bar on 'qualified civil liability action[s],' 15 U.S.C. § 7902(a), does not deprive courts of subject-matter jurisdiction. The language of the PLCAA does not speak in jurisdictional terms or refer in any way to the *jurisdiction of the [district courts]* ... Instead, it provides only that '[a] qualified civil liability action may not be brought in any Federal or State court.' 15 U.S.C. § 7902(a). Although the phrase 'may not be brought' suggests absence of jurisdiction, the phrase is not equivalent to a clear statement of Congress's intent to limit the power of the courts rather than the rights of litigants ... In the absence of such a clear statement, we must treat the PLCAA as speaking only to the rights and obligations of the litigants, not to the power of the court ... Having determined that we possess subject-matter jurisdiction, we would, in the ordinary course, *proceed to consider whether the ... lawsuit is nonetheless barred by the PLCAA.* In this case, however, the defendants did not fully litigate their defenses under the PLCAA, but instead withdrew from the litigation, defaulted, and suffered a default judgment to be entered against them. We accordingly

inquire not whether the ... lawsuit was barred by the PLCAA, but rather, whether the district court abused its discretion in entering a default judgment against the defendants." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Id.,* at 645 F.3d 127.

***6** Here, the parties extensively briefed and argued the applicability of the PLCAA in connection with the defendants' motion to dismiss, and no default judgment was involved. Once jurisdiction was raised by the defendants' motion to dismiss, the court was obligated to consider it. "Once the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented ... The court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *St. Paul Travelers Cos. v. Kuehl,* 299 Conn. 800, 816, 12 A.3d 852 (2011).

In addition, *Mickalis* concerned subject matter jurisdiction in the United States District Court, not in the Connecticut Superior Court. Whether a federal court has subject matter jurisdiction presents a question which differs from whether this court has subject matter jurisdiction. "Federal district courts, like other Article III courts, are 'courts of limited jurisdiction ... [that] possess only that power authorized by [the] Constitution and statute.' *Exxon Mobil Corp. v. Allapattah Servs.,* 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005)[.]" (Internal quotation marks omitted). *Arar v. Ashcroft,* 532 F.3d 157, 170 (2d Cir.2008).

"[U]nlike the judicial articles of most state constitutions and that of the United States constitution (article III), the powers and jurisdiction of the two courts [originally] specifically named in the Connecticut constitution (the Supreme and Superior Courts) are not specified. The reason is obvious. The 1818 constitution neither created nor provided for the creation of a new judicial system of new courts. Rather, it adopted and gave permanence in the constitution to the existence of the ... Superior Court as the trial court of general jurisdiction." (Footnote omitted; internal quotation marks omitted.) *State v. DeJesus,* 288 Conn. 418, 456–57, 953 A.2d 45 (2008). In contrast to the United States District Court, this court's subject matter jurisdiction is derived from Connecticut law, not the United States Constitution or federal statutory law. See *id.*

Consistent with the approach discussed in *City of N.Y. v. Mickalis Pawn Shop, LLC, supra,* this court, in its decision, proceeded to conclude that the operative complaint was barred by the PLCAA. As a result, judgment entered for the defendants. Where the PLCAA bars the action, dismissal is required. See *City of New York v. Beretta U.S.A. Corp.,* 524 F.3d 384, 389, 395, 404 (2d Cir.2008), cert. denied, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009) (motion to dismiss amended complaint; appellate court directed dismissal of the case as barred by the PLCAA.).

"An amendment after judgment ... is a possible, but most extraordinary, remedy, to be allowed only in exceptional cases and with the greatest caution." *Kelly, Administrator v. New Haven Steamboat Co.,* 75 Conn. 42, 47, 52 A. 261 (1902). "[T]he trial court has wide discretion in granting or denying amendments before, during, or after trial." (Internal quotation marks omitted.) *Sherman v. Ronco,* 294 Conn. 548, 554 n. 10, 985 A.2d 1042 (2010).

***7** "In determining whether there has been an abuse of discretion [in granting or denying an amendment], much depends on the circumstances of each case ... In the final analysis, the court will allow an amendment unless it will cause an unreasonable delay, mislead the opposing party, take unfair advantage of the opposing party or confuse the issues, or if there has been negligence or laches attaching to the offering party." (Citations omitted; internal quotation marks omitted.) *McNeil v. Riccio,* 45 Conn.App. 466, 474, 696 A.2d 1050 (1997). "The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Franc v. Bethel Holding Co.,* 73 Conn.App. 114, 132, 807 A.2d 519, cert. granted on other grounds, 262 Conn. 923, 812 A.2d 864 (2002) (appeal withdrawn October 21, 2003).

"In exercising its discretion with reference to a motion for leave to amend, a court should ordinarily be guided by its determination of the question whether the greater injustice will be done to the mover by denying him his day in court on the subject matter of the proposed amendment, or to his adversary by granting the motion, with the resultant delay." *DuBose v. Carabetta,* 161 Conn. 254, 263, 287 A.2d 357 (1971).

As explained above, the plaintiffs filed three complaints in this matter since it was commenced in August 2009 (see return of service), prior to the court's consideration of the motion to dismiss the second amended complaint. As a result, the defendants briefed three separate motions to dismiss premised on the PLCAA. The proposed third amended complaint is the plaintiffs' fourth attempt at pleading their claims. Thus, the plaintiffs had ample opportunity to frame their allegations adequately so that they would have their day in court concerning their claims, which, as discussed in the court's decision, arise from the assault, abduction and shooting to death of Jennifer Magnano. See *Kelley v. Bonney,* 221 Conn. 549, 592, 606 A.2d 693 (1992) (court may properly deny motion to amend where, after several opportunities to do so, plaintiff has not framed complaint adequately).

Without citations to authority and without analysis, the plaintiffs assert, in their memorandum (# 165), page 5, that their proposed "amendments specifically bring the case outside the scope of the PLCAA, allowing Plaintiffs their day in court." Their reply memorandum (# 171) is similarly devoid of such citations and analysis to support this assertion.

For example, they do not address the court's discussion of the issues in its decision, which included extensive citations to decisional authority. In their memorandum, page 2, they cite proposed amendments in the third amended complaint, which allege that the defendants 'negligently and unlawfully transferred [the Glock and ammunition] to Scott Magnano' without completing a required Form 4473 or conducting a required Brady background check, even though they 'reasonably should have known that Magnano was not legally eligible to purchase a firearm.' " In its decision concerning the second amended complaint, the court addressed issues concerning transfer and delivery (see decision, pages 9–16) and discussed ATF Form 4473 and the background check requirement (see decision, pages 26–27).

***8** Similarly, at page three of their memorandum, the plaintiffs assert that their proposed amendments also allege that the defendants " 'entrusted the firearms to Magnano' and 'transferred dominion and control of the firearms to Magnano' even though Sportsman's Outpost 'knew or had reason to know [Magnano] was likely to use the [Glock 21] firearm in a manner involving unreasonable risk of bodily harm to himself' "; and that "the gun shop's illegal and untimely failure to report to law enforcement that the gun was no longer in the shop is a common tactic used by 'gun dealers who sell guns off the books, without records of sale or background checks.' " In its decision, the court also addressed negligent entrustment (see decision, pages 23–26) and the fact that no "off the books sale" by the defendants to Magnano was alleged (see decision, pages 15–16). Review of the plaintiffs' proposed amendments shows that, again, this theory is neither pleaded nor necessarily implied in their allegations. See third amended complaint, ¶¶ 69–70; *Gold v. Rowland,* 296 Conn. 186, 200–01, 994 A.2d 106 (2010).

"Because the plaintiffs do not cite any authority or develop their claim with analysis, [the court concludes] that the claim is inadequately briefed. See, e.g., *Connecticut Light & Power Co. v. Dept. of Public Utility Control,* 266 Conn. 108, 120, 830 A.2d 1121 (2003) ('[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly' [internal quotation marks omitted])." *Hartford/Windsor Healthcare Properties, LLC v. Hartford,* 298 Conn. 191, 194 n. 4, 3 A.3d 56 (2010). See *Smith v. Andrews,* 289 Conn. 61, 80, 959 A.2d 597 (2008), where, concerning a schedule of patients and surgeries to be performed, see *id.,* at 77, the court stated, "With respect to the schedule, the plaintiff's brief consists of three pages of facts and *no* citation to any legal authority. We consider that claim to be abandoned." (Emphasis in original.) Here, likewise, in the absence of analysis and citations to authority, the court considers the plaintiffs' claim that their proposed amendments bring the case outside the scope of the PLCAA to be inadequately briefed and, therefore, abandoned.

In view of the history of this matter, discussed above, involving the successive pendency of motions challenging the plaintiffs' various complaints, no trial date was scheduled. As discussed in the decision, the PLCAA prohibits the commencement of a "qualified civil liability action" in any state court. See 15 U.S.C. § 7902(a). The court is mindful of the purposes of the PLCAA, as stated by Congress, among which are: "(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product

functioned as designed and intended ... [and] (4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." See 15 U.S.C. § 7901(b).

***9** Thus, the circumstances here differ substantially from those in cases cited by the plaintiffs concerning amendments. In contrast to *Miller v. Fishman,* 102 Conn.App. 286, 292, 925 A.2d 441 (2007), cert. denied, 285 Conn. 905, 942 A.2d 414 (2008), where the plaintiffs demonstrated that if they had been allowed to amend their complaint, "the basis for summary judgment would have fallen away"; here, as discussed above, the plaintiffs have not substantively addressed the court's decision and shown that their proposed amendments would take the case outside the PLCAA's prohibition.

Similarly, no circumstances involving a statutory prohibition and successive motions to dismiss were present in *Burton v. Stamford,* 115 Conn.App. 47, 52–53, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009), where the trial court set aside a directed verdict and determined, in the exercise of its discretion, that the plaintiff's motion to amend during trial should have been permitted. The trial court stated, "the denial [of the motion to amend] turned a plaintiff claiming serious injuries out of court without a decision on the merits of his claim. Permitting the amendment would have caused the defendant only to have to reframe its request to charge and final arguments to the jury in terms of one statute rather than another. The key liability issues would be the same under either statute ..." (Internal quotation marks omitted.) *Id.,* at 61. Accordingly, the trial court concluded that the amendment "would cause no prejudice to the defendant [.]" *Id.,* at 62.

The situation in *Jacob v. Dometic Origo AB,* 100 Conn.App. 107, 110–11, 916 A.2d 872, cert. granted, 282 Conn. 922, 925 A.2d 1103 (2007), also differs from the circumstances in this matter. In that matter, there was no history of successive motions dismiss filed by the defendants, based on a statutory scheme which prohibited the commencement of the action. Rather, in *Jacob,* the trial court denied a motion to amend since it concluded that the plaintiff had been negligent in prosecuting the claim. See *id.,* at 112. Under the circumstances there, the Appellate Court stated, "[a]lthough the plaintiff may have been delinquent in filing her memorandum of law opposing summary judgment and brought this motion for leave to amend the complaint after the time for pleadings had closed, no significant injustice or prejudice worked against the defendants." *Id.,* at 114.

As discussed above, here, in view of the purposes of the PLCAA, since the plaintiffs were afforded several opportunities to frame their allegations, requiring the defendants to continuously address the plaintiffs' changing allegations, allowing the proposed amendments post-judgment, when the amendments have not been shown to take the case outside of the PLCAA's prohibition on commencement of a "qualified civil liability action" in any state court, see 15 U.S.C. § 7902(a), would prejudice and take unfair advantage of the defendants.

***10** In earlier cases cited by the plaintiffs, *Tedesco v. Julius C. Pagano, Inc.,* 182 Conn. 339, 341, 438 A.2d 95 (1980); *Smith v. New Haven,* 144 Conn. 126, 132, 127 A.2d 829 (1956); and *Cook v. Lawlor,* 139 Conn. 68, 72, 90 A.2d 164 (1952), there was no similar history and no statutory scheme which prohibited the commencement of the action.

The procedural history here is closer to that in *Collum v. Chapin,* 40 Conn.App. 449, 671 A.2d 1329 (1996), where the plaintiff moved to amend his complaint after issuance of the court's memorandum of decision granting the defendants' motion for summary judgment. See *id.,* at 451. The Appellate Court affirmed the trial court's refusal to allow the plaintiff to amend the complaint after he received the trial court's decision and stated, "[t]he trial court's refusal to allow a belated amendment to a pleading in response to the filing of a motion for summary judgment by the adverse party will be sustained unless there is clear evidence of an abuse of discretion ... Where, as here, the motion was filed after the court had already ruled in favor of the defendant on its summary judgment motion, its action was clearly justified." (Internal quotation marks omitted.) *Id.,* at 453–54.

Under the circumstances here, the defendants would be unduly prejudiced and unfair advantage of them taken if amendment were permitted after judgment by the court. At this stage of the proceedings, since the plaintiffs had several opportunities to adequately plead their claims in advance of the court's consideration of the motion to dismiss the second amended complaint, in order to avoid the PLCAA's prohibition on commencement of

a "qualified civil liability action"; and since they have not shown that their proposed amendments would take the case outside the PLCAA in order to afford them an opportunity to present their case on the merits at trial, the greater injustice would be done to the defendants if the court permitted the proposed amendments after judgment has been rendered and the case dismissed, by continuing this litigation, thus requiring them to go on defending against it.

The Supreme Court recently reiterated the policy that "[o]nce a judgment [is] rendered it is to be considered final and it should be left undisturbed by post-trial motions except for a good and compelling reason ... Otherwise, there might never be an end to litigation." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber, Inc. v. Tager,* 288 Conn. 69, 107, 952 A.2d 1 (2008). For the reasons stated above, in the exercise of the court's discretion, the plaintiffs' June 2011 motion to amend is denied. [4]

CONCLUSION

Based on the foregoing reasons, the plaintiffs' motion to reargue and their June 2011 motion to amend are denied. It is so ordered.

All Citations

Not Reported in A.3d, 2011 WL 4509540

Footnotes

1 See discussion of *Mickalis,* below.

2 Connecticut's appellate courts have stated that belated attempts to avoid adverse results should not be rewarded. "We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial. *Krattenstein v. G. Fox & Co.,* 155 Conn. 609, 616, 236 A.2d 466 (1967) ... The plaintiff's attempt to manipulate the arbitration process by reserving objection until after the announcement of the arbitral award is precisely the kind of conduct we discountenanced in *Krattenstein v. G. Fox & Co., supra.* We will not reward such conduct here." (Internal quotation marks omitted.) *Shore v. Haverson Architecture And Design, P.C.,* 92 Conn.App. 469, 476–77, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006).

3 The plaintiffs also assert that the motion to reargue was not just one document filed in isolation and that Practice Book § 63–1 contemplates multiple filings. Practice Book § 63–1(e) provides, "Any party filing more than one motion that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, shall file such motions simultaneously insofar as simultaneous filing is possible." The fact that the plaintiffs were filing two motions does not convert the June 2011 motion to amend into a motion which would render the decision ineffective or operate to negate the date of filing requirement set forth in Practice Book § 7–17. Practice Book § 63–1(e) directs a party who is filing more than one motion which would render a judgment or decision ineffective to file them together, rather than days or weeks apart.

4 In view of this determination, the court need not consider the defendants' judicial estoppel argument.

JOINT
STANDING
COMMITTEE
HEARINGS

GENERAL LAW
PART 1
1-459

1978
INDEX

CONNECTICUT GENERAL ASSEMBLY
1978

JOINT STANDING COMMITTEE
ON
GENERAL LAW

ROBERT LANGER (Continued): ability to define trade or commerce wherever property would be located, not merely within the State. Some questions have been raised as to why that is necessary.

While I think it's unlikely, we would like to be absolutely clear that in the case of mail order frauds, after which we have gone on a number of occasions, we would not wish to be excluded if the entire actions of mail order companies were outside of the State of Connecticut, damaging consumers within the State of Connecticut, we would not wish to have interposed a defense by defendant's counsel that we could not go after that type of problem, and I think that another case involving the Attorney General of Wisconsin which I have used as a means of drafting this particular legislation would clarify that problem. And I'm hopeful that both with respect to mail order fraud and renting and leasing of real and personal property 5613 will take care of that particular problem that we see.

REP. GRANDE: Any questions from the Committee?

REP. FRANKL: Representative Frankl, 121st. First question, the Superior Court case you mentioned, is that matter under appeal?

ROBERT LANGER: Unfortunately, we entered that case as a friend of the court. As an Amicus Cureae, and the plaintiffs did not have sufficient funds in which to appeal it to the Supreme Court. So consequently we're left with a lower court decision with which we can do nothing. As an Amicus as opposed to an intervener we do not have authority to appeal on our own.

REP. FRANKL: Then it has not been appealed.

ROBERT LANGER: That's correct.

REP. FRANKL: Secondly, the change in language on line 35 and 37 it modifies the entire prior lines in sub-section 4. I'm wondering how you view the area of advertising now that it is not necessarily limited strictly to the State lines themselves. How do you view the effect of that and what do you view the involvement of the agency in advertising through the media such as television?

ROBERT LANGER: I think that the amendment to the definition of trade or commerce with respect to property outside of the State of Connecticut would merely give to the State

ROBERT LANGER (Continued): its full Constitutional authority to remedy problems. Obviously, if, in fact, as I mentioned, mail ordering is particular problem that I see which causes the need for this particular amendment to the definition. Without it, we may be successful, we may not be successful, but I can't imagine anyone would want to put us into a position of losing a case just because it's a mail order firm located in St. Louis that deals solely by media advertising which happens to find its way into the State of Connecticut, defrauds Connecticut consumers, and we have to plead with the Missouri Attorney General's office to help us rather than be able to do it on our own.

REP. GRANDE: Any other questions?

REP. BENNETT: I have one. I'm just concerned with how much of a problem is this at the moment? Is it a large problem, an extensive problem, or is it a minor problem?

ROBERT LANGER: Which particular issue?

REP. BENNETT: With respect of leasing and renting.

ROBERT LANGER: The reason for the proposed amendment is that I would expect there could be a great deal of litigation in the State under the Connecticut Unfair Trade Practices Act which is now not being brought because of the hesitancy of plaintiff's counsel because they think that leasing and rental was not included. The question of whether it's a problem, I think there is a great number of rights of consumers in the State of Connecticut that could be vindicated, which cannot be vindicated now because the act has been read very, very narrowly. I would like to see the act read as expansively as the Federal Trade Commission Act is itself. The answer, as best I can, the problem, I'm not sure how much of a problem it is because in the area of developing litigation in new statutes, I don't know how much action would take place under the statute until after the act was amended.

REP. BENNETT: Would you give me a quick example where this would be applicable?

ROBERT LANGER: Certainly. In the case of a landlord misrepresenting quality of the premises or any types of overt misrepresentations by landlords would possibly trigger an action under the Unfair Trade Practices Act which may do damage to tenants. It would also include though the renting, let's suppose there

ROBERT LANGER (Continued): was a leasing agreement between one business and another business, or a leasing agreement between a business and a consumer for any type of goods. Let's say the leasing of a car. It's arguable that under the present definition that would not also be included. I think that would be clearly a mistake and inconsistent with the Federal Trade Commission Act.

REP. BENNETT: Thank you.

REP. GRANDE: Thank you very much. Any other questions?

REP. WILLARD: Are you saying that the definition in sub-section 4 now to include leasing of real or personal property is a definition that is in the federal act?

ROBERT LANGER: It is the definition which is in Massachusetts and in Pennsylvania and what I'm saying is that the Federal Trade Commission Act definition of trade or commerce does include leasing.

REP. WILLARD: Leasing of real property?

ROBERT LANGER: Yes.

REP. WILLARD: I see. Just a general question, do you see any conflict if you include this provision, do you see any conflict under the landlord tenants bills that we've passed where we tried to get the correlation between the landlord and tenant, the rights and obligations vice versa. If we interject the Department of Consumer Protection, do you see any problem in the dual approach to the problem?

ROBERT LANGER: There are a great number of statutes which I personally involved in administering or assisting the Department of Consumer Protection administering which grants concurrent jurisdiction to more than one state agency, and I think that the function of our courts is to make clear that there are certain areas which one agency can act on and others can act on in other circumstances. I don't foresee any problems with concurrent jurisdiction between the Department of Consumer Protection and private litigation which could result under that in landlord tenant bill. I think they are directed in precisely the same way and would express the same concerns of the Legislature.

REP. WILLARD: So, if they are precisely the same and concurrent you feel that it's necessary, I understand you're the one

REP. WILLARD (Continued): that's supporting the bill, the Department. You feel that the landlord tenant legislation that we have passed in an attempt to get a sense of equilibrium between the problem is not sufficient, or do you need additional enforcement in the Department?

ROBERT LANGER: Well, I think that one thing is clear from the landlord tenant bill is that the Attorney General's office at the request of the Commissioner cannot now institute litigation. And it seems to me there are certain circumstances in which it would be the Attorney General's office through the resources they could do a better job. Just because we have developed expertise in the unfair and deceptive trade practice area, I would think that as an alternative remedy perhaps the Legislature ought to consider at least allowing us the option of litigation in certain circumstances that other people can't tend to.

REP. FERRARI: Mr. Chairman. A question for clarification. It's also true that this would have far greater scope than simply landlord tenant problems. In other words, when we're talking about lease or rent, we're also talking about commercial property, we're talking about protecting small business people and things of that nature. That really has nothing to do with the landlord tenant act.

ROBERT LANGER: That's absolutely correct. And I foresee for our office and the Department of Consumer Protection far greater emphasis upon the leasing provision in terms of the leasing of automobiles, for instance, the types of deceptions which can take place in that particular area, more than the landlord tenant area which could probably in most cases, but not all cases be handled by private litigation.

REP. FERRARI: Thank you.

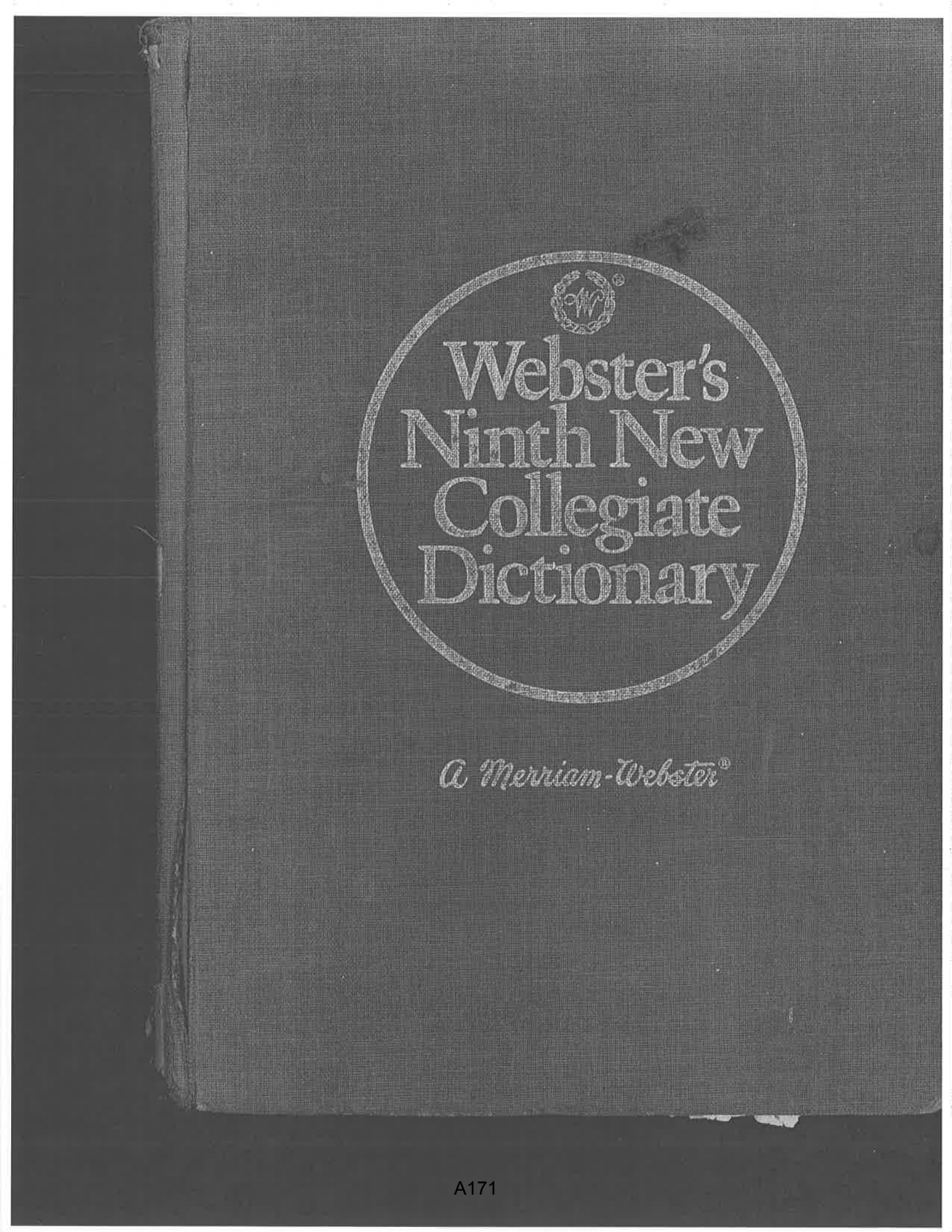
ROBERT LANGER: Thank you.

REP. GRANDE: Thank you very much. S. F. Riepma, if he's qualified.

S. F. RIEPMAN: I hope I am.

REP. GRANDE: We understand that you went downstairs to become a qualified lobbyist.

S. F. RIEPMAN: Yes, I'm now qualified and I paid $20.


Webster's
Ninth New
Collegiate
Dictionary
A Merriam-Webster®

A GENUINE MERRIAM-WEBSTER

The name *Webster* alone is no guarantee of excellence. It is used by a number of publishers and may serve mainly to mislead an unwary buyer.

A Merriam-Webster® is the registered trademark you should look for when you consider the purchase of dictionaries or other fine reference books. It carries the reputation of a company that has been publishing since 1831 and is your assurance of quality and authority.

Library of Congress Cataloging in Publication Data
Main entry under title:

Webster's ninth new collegiate dictionary.

Based on Webster's third new international dictionary.
Includes index.
1. English language—Dictionaries. I. Merriam-Webster Inc.
PE1628.W5638 1987 423 86-23801
ISBN 0-87779-508-8
ISBN 0-87779-509-6 (indexed)
ISBN 0-87779-510-X (deluxe)

Made in the United States of America

212223242526RMcN87

im·pli·cate \'im-plə-ˌkāt\ *vt* **-cat·ed; -cat·ing** [L *implicatus*, pp. of *implicare* — more at EMPLOY] (15c) **1** *archaic* : to fold or twist together : ENTWINE **2** : to involve as a consequence, corollary, or natural inference : IMPLY **3 a** : to bring into intimate or incriminating connection **b** : to involve in the nature or operation of something

im·pli·ca·tion \ˌim-plə-'kā-shən\ *n* (15c) **1 a** : the act of implicating : the state of being implicated **b** : close connection; *esp* : an incriminating involvement **2 a** : the act of implying : the state of being implied **b** (1) : a logical relation between two propositions that fails to hold only if the first is true and the second is false (2) : a logical relationship between two propositions in which if the first is true the second is true (3) : a statement exhibiting a relation of implication **3** : something implied: as **a** : SUGGESTION **b** : a possible significance ⟨the book has political ~s⟩ — **im·pli·ca·tive** \'im-plə-ˌkāt-iv, im-'plik-ət-\ *adj* — **im·pli·ca·tive·ly** *adv* — **im·pli·ca·tive·ness** *n*

im·plic·it \im-'plis-ət\ *adj* [L *implicitus*, pp. of *implicare*] (1599) **1 a** : capable of being understood from something else though unexpressed : IMPLIED ⟨an ~ assumption⟩ **b** : involved in the nature or essence of something though not revealed, expressed, or developed : POTENTIAL ⟨a sculptor may see different figures ~ in a block of stone —John Dewey⟩ **c** *of a mathematical function* : defined by an expression in which the dependent variable and the one or more independent variables are not separated on opposite sides of an equation ⟨in $x + 3xy + y = 0$, y is an ~ function of x⟩ — compare EXPLICIT 4 **2** : being without doubt or reserve : UNQUESTIONING — **im·plic·it·ly** *adv* — **im·plic·it·ness** *n*

implicit differentiation *n* (ca. 1891) : the process of finding the derivative of a dependent variable in an implicit function by differentiating each term separately, by expressing the derivative of the dependent variable as a symbol, and by solving the resulting expression for the symbol

im·plode \im-'plōd\ *vb* **im·plod·ed; im·plod·ing** [*in-* + *-plode* (as in *explode*)] *vi* (1881) **1 a** : to burst inward ⟨a blow causing a vacuum tube to ~⟩ **b** : to undergo violent compression ⟨massive stars which ~⟩ **2** : to collapse inward as if from external pressure; *also* : to become greatly reduced as if from collapsing ~ *vt* : to cause to implode

im·plore \im-'plō(ə)r, -'plȯ(ə)r\ *vt* **im·plored; im·plor·ing** [MF or L; MF *implorer*, fr. L *implorare*, fr. *in-* + *plorare* to cry out] (1540) **1** : to call upon in supplication : BESEECH **2** : to call or pray for earnestly : ENTREAT ***syn*** see BEG — **im·plor·ing·ly** *adv*

im·plo·sion \im-'plō-zhən\ *n* [*in-* + *-plosion* (as in *explosion*)] (1877) **1** : the inrush of air in forming a suction stop **2** : the action of imploding **3** : the act or action of bringing to or as if to a center; *also* : INTEGRATION ⟨this ~ of cultures makes realistic for the first time the age-old vision of a world culture —Kenneth Keniston⟩ — **im·plo·sive** \-'plō-siv, -ziv\ *adj or n*

im·ply \im-'plī\ *vt* **im·plied; im·ply·ing** [ME *emplien*, fr. MF *emplier*, fr. L *implicare*] (14c) **1** *obs* : ENFOLD, ENTWINE **2** : to involve or indicate by inference, association, or necessary consequence rather than by direct statement ⟨rights ~ obligations⟩ **3** : to contain potentially **4** : to express indirectly ⟨his silence *implied* consent⟩ ***syn*** see SUGGEST ***usage*** see INFER

im·po·lite \ˌim-pə-'līt\ *adj* [L *impolitus*, fr. *in-* + *politus* polite] (1739) : not polite : RUDE — **im·po·lite·ly** *adv* — **im·po·lite·ness** *n*

im·pol·i·tic \(')im-'päl-ə-ˌtik\ *adj* (1600) : not politic : RASH — **im·po·lit·i·cal** \ˌim-pə-'lit-i-kəl\ *adj* — **im·po·lit·i·cal·ly** \-'lit-i-k(ə-)lē\ *adv* — **im·pol·i·tic·ly** \(')im-'päl-ə-ˌtik-lē\ *adv*

im·pon·der·a·ble \(')im-'pän-d(ə-)rə-bəl\ *adj* [ML *imponderabilis*, fr. L *in-* + LL *ponderabilis* ponderable] (1794) : not ponderable : incapable of being weighed or evaluated with exactness — **im·pon·der·a·bil·i·ty** \(ˌ)im-ˌpän-d(ə-)rə-'bil-ət-ē\ *n* — **imponderable** *n* — **im·pon·der·a·bly** \(')im-'pän-d(ə-)rə-blē\ *adv*

im·pone \im-'pōn\ *vt* **im·poned; im·pon·ing** [L *imponere* to put upon, fr. *in-* + *ponere* to put — more at POSITION] *obs* (1529) : WAGER, BET

¹im·port \im-'pō(ə)rt, -'pȯ(ə)rt, 'im-ˌ\ *vb* [ME *importen*, fr. L *importare* to bring into, fr. *in-* + *portare* to carry — more at FARE] *vt* (15c) **1 a** : to bear or convey as meaning or portent : SIGNIFY **b** *archaic* : EXPRESS, STATE **c** : IMPLY **2** : to bring from a foreign or external source; *esp* : to bring (as merchandise) into a place or country from another country **3** *archaic* : to be of importance to : CONCERN ~ *vi* : to be of consequence : MATTER — **im·port·able** \im-'pōrt-ə-bəl, -'pȯrt-, 'im-ˌ\ *adj* — **im·port·er** *n*

²im·port \'im-ˌpō(ə)rt, -ˌpȯ(ə)rt\ *n* (1570) **1** : IMPORTANCE; *esp* : relative importance ⟨it is hard to determine the ~ of this decision⟩ **2** : PURPORT, SIGNIFICATION **3** : something that is imported **4** : IMPORTATION

im·por·tance \im-'pȯrt-ᵊn(t)s, *esp Southern & NewEng* -ən(t)s\ *n* (1508) **1 a** : the quality or state of being important : CONSEQUENCE **b** : an important aspect or bearing : SIGNIFICANCE **2** *obs* : IMPORT, MEANING **3** *obs* : IMPORTUNITY **4** *obs* : a weighty matter

syn IMPORTANCE, CONSEQUENCE, MOMENT, WEIGHT, SIGNIFICANCE mean a quality or aspect having great worth or significance. IMPORTANCE implies a value judgment of the superior worth or influence of something or someone; CONSEQUENCE may imply importance in social rank but more generally implies importance because of probable or possible effects; MOMENT implies conspicuous or self-evident consequence; WEIGHT implies a judgment of the immediate relative importance of something; SIGNIFICANCE implies a quality or character that should mark a thing as important but that is not self-evident and may or may not be recognized.

im·por·tan·cy \-ᵊn-sē, -ən-\ *n, archaic* (1540) : IMPORTANCE

im·por·tant \im-'pȯrt-ᵊnt, *esp Southern & NewEng* -ənt\ *adj* [MF, fr. OIt *importante*, fr. L *important-*, *importans*, prp. of *importare*] (15c) **1** : marked by or indicative of significant worth or consequence : valuable in content or relationship **2** *obs* : IMPORTUNATE, URGENT **3** : giving evidence of a feeling of self-importance — **im·por·tant·ly** *adv*

im·por·ta·tion \ˌim-ˌpōr-'tā-shən, -ˌpȯr-, -pər-\ *n* (1601) **1** : the act or practice of importing **2** : something imported

imported cabbageworm *n* (1892) : a small cosmopolitan white butterfly (*Pieris rapae*) or its larva which is a pest of cruciferous plants and esp. cabbage

imported fire ant *n* (ca. 1949) : either of two mound-building So. American fire ants (*Solenopsis richteri* and *S. invicta*) introduced into the southeastern U.S. that interfere with agriculture and can produce stings requiring medical attention

im·por·tu·nate \im-'pȯrch-(ə-)nət\ *adj* (15c) **1** : troublesomely urgent : overly persistent in request or demand **2** : TROUBLESOME — **im·por·tu·nate·ly** *adv* — **im·por·tu·nate·ness** *n*

¹im·por·tune \ˌim-pər-'t(y)ün, im-'pȯr-chən\ *adj* [ME, fr. MF & L; MF *importun*, fr. L *importunus*, fr. *in-* + *-portunus* (as in *opportunus* fit) — more at OPPORTUNE] (15c) : IMPORTUNATE — **im·por·tune·ly** *adv*

²importune *vb* **-tuned; -tun·ing** *vt* (1530) **1 a** : to press or urge with troublesome persistence **b** *archaic* : to beg, urge, or solicit persistently or troublesomely ***syn*** see BEG — **im·por·tun·er** *n*

im·por·tu·ni·ty \ˌim-pər-'t(y)ü-nət-ē\ *n, pl* **-ties** (15c) **1** : the quality or state of being importunate **2** : an importunate request or demand

im·pose \im-'pōz\ *vb* **im·posed; im·pos·ing** [MF *imposer*, fr. L *imponere*, lit., to put upon (perf. indic. *imposui*), fr. *in-* + *ponere* to put — more at POSITION] *vt* (1581) **1 a** : to establish or apply by authority ⟨~ a tax⟩ ⟨~ new restrictions⟩ ⟨~ penalties⟩ **b** : to establish or bring about as if by force ⟨those limits *imposed* by our own inadequacies — C. H. Plimpton⟩ **2 a** : PLACE, SET **b** : to arrange (as pages) in the proper order for printing **3** : PASS OFF ⟨~ fake antiques on the public⟩ **4** : to force into the company or on the attention of another ⟨~ oneself on others⟩ ~ *vi* : to take unwarranted advantage of something ⟨*imposed* on his good nature⟩ — **im·pos·er** *n*

im·pos·ing \im-'pō-ziŋ\ *adj* (1786) : impressive because of size, bearing, dignity, or grandeur ***syn*** see GRAND — **im·pos·ing·ly** \-ziŋ-lē\ *adv*

im·po·si·tion \ˌim-pə-'zish-ən\ *n* (14c) **1** : the act of imposing **2** : something imposed: as **a** : LEVY, TAX **b** : an excessive or uncalled-for requirement or burden **3** : DECEPTION **4** : the order of arrangement of imposed pages

im·pos·si·bil·i·ty \(ˌ)im-ˌpäs-ə-'bil-ət-ē\ *n* (14c) **1** : the quality or state of being impossible **2** : something impossible

im·pos·si·ble \(')im-'päs-ə-bəl\ *adj* [ME, fr. MF & L; MF, fr. L *impossibilis*, fr. *in-* + *possibilis* possible] (14c) **1 a** : incapable of being or of occurring **b** : felt to be incapable of being done, attained, or fulfilled : insuperably difficult **2 a** : extremely undesirable : UNACCEPTABLE **b** : extremely awkward or difficult to deal with — **im·pos·si·ble·ness** *n* — **im·pos·si·bly** \-blē\ *adv*

¹im·post \'im-ˌpōst\ *n* [MF, fr. ML *impositum*, fr. L, neut. of *impositus*, pp. of *imponere*] (1568) : something imposed or levied : TAX

²impost *n* [F *imposte*, deriv. of L *impositus*] (ca. 1664) : a block, capital, or molding from which an arch springs — see ARCH illustration

im·pos·tor *or* **im·pos·ter** \im-'päs-tər\ *n* [LL *impostor*, fr. *impostus*, pp.] (1586) : one that assumes an identity or title not his own for the purpose of deception

im·pos·tume \im-'päs-ˌchüm\ *or* **im·pos·thume** \-ˌth(y)üm\ *n* [ME *emposteme*, deriv. of Gk *apostēma*, fr. *aphistanai* to remove, fr. *apo-* + *histanai* to cause to stand — more at STAND] *archaic* (14c) : ABSCESS

im·pos·ture \im-'päs-chər\ *n* [LL *impostura*, fr. L *impositus*, *impostus*, pp. of *imponere*] (1537) **1** : the act or practice of deceiving by means of an assumed character or name **2** : an instance of imposture

syn IMPOSTURE, FRAUD, SHAM, FAKE, HUMBUG, COUNTERFEIT mean a thing made to seem other than it is. IMPOSTURE applies to any situation in which a spurious object or performance is passed off as genuine; FRAUD usu. implies a deliberate perversion of the truth; SHAM applies to fraudulent imitation of a real thing or action; FAKE implies an imitation of or substitution for the genuine but does not necessarily imply dishonesty; HUMBUG suggests elaborate pretense usu. so flagrant as to be transparent; COUNTERFEIT applies esp. to the close imitation of something valuable.

im·po·tence \'im-pət-ən(t)s\ *n* (15c) : the quality or state of being impotent

im·po·ten·cy \-ən-sē\ *n* (15c) : IMPOTENCE

im·po·tent \'im-pət-ənt\ *adj* [ME, fr. MF & L; MF, fr. L *impotent-*, *impotens*, fr. *in-* + *potent-*, *potens* potent] (14c) **1 a** : not potent : lacking in power, strength, or vigor : HELPLESS **b** : unable to copulate; *broadly* : STERILE — usu. used of males **2** *obs* : incapable of self-restraint : UNGOVERNABLE — **impotent** *n* — **im·po·tent·ly** *adv*

im·pound \im-'paůnd\ *vt* (15c) **1 a** : to shut up in or as if in a pound : CONFINE **b** : to seize and hold in the custody of the law **2** : to collect and confine (water) in or as if in a reservoir

im·pound·ment \-'paůn(d)-mənt\ *n* (1664) **1** : the act of impounding : the state of being impounded **2** : a body of water formed by impounding

im·pov·er·ish \im-'päv-(ə-)rish\ *vt* [ME *enpoverisen*, fr. MF *empovriss-*, stem of *empovrir*, fr. *en-* + *povre* poor — more at POOR] (15c) **1** : to make poor **2** : to deprive of strength, richness, or fertility by depleting or draining of something essential ***syn*** see DEPLETE — **im·pov·er·ish·er** *n* — **im·pov·er·ish·ment** \-mənt\ *n*

im·pov·er·ished *adj, of a fauna or flora* (1950) : represented by few species or individuals

im·prac·ti·ca·ble \(')im-'prak-ti-kə-bəl\ *adj* (1653) **1** : not practicable : incapable of being performed or accomplished by the means employed or at command **2** : IMPASSABLE ⟨an ~ road⟩ — **im·prac·ti·ca·bil·i·ty** \(ˌ)im-ˌprak-ti-kə-'bil-ət-ē\ *n* — **im·prac·ti·ca·bly** \(')im-'prak-ti-kə-blē\ *adv*

im·prac·ti·cal \(')im-'prak-ti-kəl\ *adj* (1865) : not practical: as **a** : not wise to put into or keep in practice or effect **b** : incapable of dealing sensibly or prudently with practical matters **c** : IMPRACTICABLE **d** : IDEALISTIC — **im·prac·ti·cal·i·ty** \(ˌ)im-ˌprak-ti-'kal-ət-ē\ *n* — **im·prac·ti·cal·ly** \(')im-'prak-ti-k(ə-)lē\ *adv*

im·pre·cate \'im-pri-ˌkāt\ *vb* **-cat·ed; -cat·ing** [L *imprecatus*, pp. of *imprecari*, fr. *in-* + *precari* to pray — more at PRAY] *vt* (1616) : to invoke evil on : CURSE ~ *vi* : to utter curses

im·pre·ca·tion \ˌim-pri-'kā-shən\ *n* (15c) **1** : the act of imprecating **2** : CURSE — **im·pre·ca·to·ry** \'im-pri-kə-ˌtōr-ē, im-'prek-ə-, -ˌtȯr-\ *adj*

im·pre·cise \ˌim-pri-'sis\ *adj* (1805) : not precise : INEXACT, VAGUE — **im·pre·cise·ly** *adv* — **im·pre·cise·ness** *n* — **im·pre·ci·sion** \-'sizh-ən\ *n*